MIDDLE TEMPLE

A TREATISE ON DEEDS.

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DEEDS.

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MIDDLE TEMPLE

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BY

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PREFACE.

As appears from the title page, the present work is founded upon the book published in 1885 by Sir Howard Elphinstone, Mr. Clark, and myself. When a new edition of that work was needed Mr. Clark had been appointed to his present position of Legal Adviser to the Board of Agriculture and Fisheries, and Sir Howard Elphinstone, who was fully engaged in bringing out some of his many works on Conveyancing, asked me to prepare the new edition.

As soon as I took the old book in hand I found that it required more than merely re-editing, and I set about reconstructing the entire work. The greater part of the book has been entirely rewritten, all the authorities have been rearranged, and a large amount of additional matter has been incorporated; in fact, so extensive has been the reconstruction that Sir Howard Elphinstone very generously suggested (and Mr. Clark as generously concurred in the suggestion) that the revised book should appear under my name alone.

After I had made a first revision of the work I was so fortunate as to obtain the assistance of my friend Mr. R. H. Dun, who helped me in a second revision; but when we had nearly finished that revision his services were required by the Anglo-Egyptian Condominium in the Sudan, and he was obliged to leave the task uncompleted. *Sed uno avulso non deficit alter*, and Mr. Digby Koe kindly came to my aid; he has assisted me in the second revision of the last

few chapters and has helped me in seeing the whole book through the press: the Tables of Cases and Statutes and the Index are entirely his work.

I wish to express my warmest gratitude to both Mr. Dun and Mr. Koe for the very great assistance they have thus rendered me; it is to their industry and assiduity that such accuracy as the work possesses is to a large extent due.

The Glossary which was contained in the old book has been omitted, because it seemed to me that my friend Mr. Stroud's very useful Judicial Dictionary, the second edition of which has been lately published, contained an adequate and satisfactory discussion of the meaning of the words contained in the Glossary, and that no advantage arises from two persons doing the same work.

Sir Howard Elphinstone has kindly read the proof sheets of the present book, and I have to thank him for many valuable hints and suggestions, but it must be understood that neither he nor Mr. Clark, whose time is fully occupied by his official duties, is in any way responsible for the book in its present shape.

I have endeavoured to state the law as it is to be found in the decided cases, and except in a very few instances I have not thought that it was part of my duty to criticise the law so found. No case reported since the October number of the Law Reports has been inserted.

No one is so well aware as I am of the many deficiencies in the present work, but I hope that, notwithstanding such deficiencies, it may be found to be of some use to the profession.

R. F. N.

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CONTENTS.

		PAGE
	Preface	v
	Table of Cases	ix
	Table of Statutes	lxix
CHAP.		
I.	The Form and Execution of Deeds	1
II.	Alterations	26
III.	Expressed Intentions	43
IV.	Words to be construed in Literal Meaning	56
V.	Deed to be construed as a Whole	75
VI.	Ambiguities—Equivocations—Inaccuracies	96
VII.	Miscellaneous General Rules	112
VIII.	Extrinsic Evidence inadmissible to add to Deeds	124
IX.	Ancient Documents	140
X.	Time—Date—Parties	150
XI.	Recitals	181
XII.	Consideration—Receipt	200
XIII.	Parcels	210
XIV.	General Words—All the Estate Clause	249
XV.	Habendum	279
XVI.	Limitations to Heirs and Heirs of the Body	298
XVII.	Death without Issue	337
XVIII.	Estates for Life—Separate Estate—Restraint on Anticipation—Estates *pur autre vie*	341
XIX.	Uses—Estates of Trustees	359
XX.	Resulting Uses and Trusts—Estates by Implication	373
XXI.	Remoteness and Perpetuity	383
XXII.	Joint Tenancy—Tenancy in Common	391
XXIII.	Next of Kin—Executors—Personal Representatives	398
XXIV.	Marriage—Wife—Children—Issue	410

CHAP.		PAGE
XXV.	Eldest Son—Younger Children	429
XXVI.	Vesting of Gifts to Classes	442
XXVII.	Portions.	452
XXVIII.	Covenants	483
XXIX.	Covenants whether Joint or Several	512
XXX.	Mutual Covenants	522
XXXI.	Qualified Covenants and Covenants for Title	541
XXXII.	Covenants in Restraint of Trade	570
XXXIII.	Covenants to settle Property	579
XXXIV.	Executory Trusts and Marriage Articles	609
XXXV.	Deeds to which Foreigners are Parties	631

INDEX 637

TABLE OF CASES.

A.

PAGE

Abbey, Horseman *v.* . . 406, 412
Abbot *v.* Burton . . . 78, 320
Abbot of Strata Mercella's Case . 142
Abbott, Gillett *v.* 199
— *v.* Middleton . . 43, 121
— Penfold *v.* 499
Abbott of Osenay's Case . . 90
Abdy, *Re*, Rabbeth *v.* Donaldson 414
— *v.* Stevens 121
Abercorn (Marquess of), Bedford (Duke of) *v.* . . 626, 627, 628
Abingdon, Baring *v.* 251, 252, 254, 255
— Prowse, *v.* . . 459
Abraham *v.* Twigg . . . 306
Accidental Death Insurance Co., Braunstein *v.* 533
Accumulative Assurance Co., King *v.* 496
Ackland *v.* Lutley . . . 165
Ackroyd *v.* Smith 244
Aclom, Vanderzee, *v.* . 447, 466
Acton Local Board, Serff *v.* . 263
Adair, Anstruther *v.* . . . 633
Adam's Policy Trusts, *Re* . . 623
Adams *v.* Beck 437
— *v.* Frye 41
— *v.* Gibney 499
— *v.* Steer 49
— *v.* Tertenants of Savage . 375
— Wrotesley *v.* 212, 215, 220, 222, 226
— and the Kensington Vestry, *Re* 408
Adams and Perry's Contract, *Re* 369
Adcock, Ross *v.* 304
Addams, Wheeler *v.* 402
Addenbrooke, Foley *v.* . . . 518
Adderley, R. *v.* 166
Addington, falsely called Mellor *v.* Mellor 412
Addis *v.* Power 179
Addison, Edye *v.* 601
— *v.* Otway . 79, 223, 224
Addyman, Beckett *v.* 19
Adeane, Erskine *v.* . . 129, 130
Adey *v.* Arnold 488
Adsetts *v.* Hives 34
Agar *v.* George . . 589, 602

PAGE

Agate, Jeudwine *v.* 505
Agricultural Cattle Insurance Co. *v.* Fitzgerald . . . 30, 31
Ailoffe *v.* Scrimshire . . 50, 510
Akeroyd's Settlement, *Re*, Roberts *v.* Akeroyd . . 89, 376
Akers *v.* Sears, Gray's Settlement, *Re* 400
Alabaster, Brown *v.* 260
Albany and Bishop of St. Asaph, The Case of 158
Albert, Hesse *v.* 542
Alcock, Booth *v.* 255
Alderes *v.* Wray 52
Aldin *v.* Latimer Clark, Muirhead & Co. 270
Aldous *v.* Cornwell 39
Aldred, Crux *v.* 506
Aldwick, Ross *v.* 281
Alexander *v.* Crosbie . . . 183
— *v.* Jamieson . . . 356
— Scholefield *v.* . . 113
Alford *v.* Lee 13
Algood, Withers *v.* . . 328, 335
Alhambra, The 135
Allan *v.* Backhouse . . . 453
— *v.* Gomme 244
Allardes, Mackenzie *v.* . . . 588
Allen, *Re*, Wilson *v.* Atter . . 443
— *v.* Allen 357
— *v.* Babbington 540
— Barbat *v.* 142
— Hunt *v.* 560, 561
— Perryn *v.* 52
— Porry *v.* 52
— *v.* Taylor . . 266, 268, 271
— *v.* Thorp 406
— and Palmer's Case . 320, 325
Alleyne *v.* Alleyne 14
Allhusen *v.* Brooking . . . 52
Allin *v.* Crawshay 377
Allingham *v.* Dowley . . . 342
Allington (Lord), Napper *v.* . . 567
Allison, Coulson *v.* 411
Alliston, Edwards *v.* 380
Allnutt, *Re*, Pott *v.* Brassey 583, 588, 604, 605
Alpass *v.* Watkins . . . 314, 327
Alsop, Vernon *v.* 92

PAGE
Alston, Ruffles *v.* 413
Altham *v.* Anglesey, and Anglesey *v.* 364
Altham's Case 99, 106, 108, 213, 273, 282, 293
Alton Woods, Case of . 123, 306
Ambler, Harding *v.* 207
Amedroz *v.* Bowles, Bowles, *Re* 385
American Trading Co., Bank of China *v.* 536
Amsard, Trinidad Asphalte Co. *v.* 259
Amys *v.* Cowley 223
Ancell, Boys *v.* 505, 507
Anderson *v.* Dawson 406
— *v.* Martindale . . 521
— *v.* Oppenheimer . . 556
— Raikes *v.* 276
— *v.* St. Vincent . . 424
— *v.* Thornton . . . 191
Anderson's Case 78
Andrade, Lazarus *v.* 509
Andrew, Back *v.* 395
Andrew's Case of Gray's Inn . 561
Andrews *v.* Andrews, D'Angibau, *Re* 606
— *v.* Paradise . 556, 561
— *v.* Stroud 337
Angell, Brewster *v.* . . 625, 626
— *v.* Duke 130
Angier Bros. *v.* Stewart Bros. 160, 163
Anglesey *v.* Altham, and Altham *v.* 364
Anglo-Californian Gold Mining Co., Wilkinson *v.* 20
Anon. 1 Anders, 25 pl. 55 . . 361
— Barnard, Ch. Rep. 324 . 157
— 31 Beav. 310 192
— Bendl. 1, pl. 2. 27
— Bendl. 9, pl. 33 . . 361
— Benl. & Dal. 12, pl. 12 . 27
— Benl. & Dal. 121, pl. 153 361
— 2 Brownl. & G. 300 . . 176
— 1 Buls. 177 164
— cited Doug. 384 . . 83
— Dyer 19a, pl. 110 . . 246
— Dyer, 19b, pl. 115 . . 114
— Dyer 30a 559
— Dyer, 99a, pl. 64 . . 323
— Dyer, 160b, pl. 43 . . 281
— Dyer, 186a, pl. 1 . . 363
— Dyer, 247b, pl. 76 . . 323
— Dyer, 255a, pl. 4 . . 559
— Dyer, 261b, pl. 28 . 83, 119
— Dyer, 319b 55
— Dyer, 345a, pl. 5 . . . 153
— Dyer, 361a, pl. 8 . 281, 288
— 1 Giff. 392 376
— Godb. 42, pl. 48 . . 299
— Godb. 333 563
— Keilw. 49 pl. 6 . . 106
— Keilw. 162, pl. 2; 164, pl. 7, 32, 39
— Latch, 226 41

PAGE
Anon. 1 Leon. 227, ca. cccviii. 98, 103
— 2 Leon. 11 . . 194, 195
— 3 Leon. 4, pl. 10 . . . 323
— 3 Leon. 6 pl. xviii. . . 361
— 3 Leon. 16 . . 23, 51, 54
— 3 Leon. 32 lx. . . 287
— 3 Leon. 87, ca. cxxvi. 314, 418
— 3 Leon. 211 170
— 4 Leon. 2, pl. 3 . . 360
— 4 Leon. 198, ca. cccxvii. . 315
— 1 Madd. 36 400
— 1 Mod. 180 . . 98, 103
— 6 Mod. 149 248
— 11 Mod. 42 52
— Moore 3, pl. 5 . . . 27
— Moore, 26, pl. 87 . . 281
— Moore, 35, pl. 116 . . 31
— Moore, 40 . . 155, 163
— Moore, 43, pl. 133 . . 294
— Moore, 45 216
— Moore, 72, pl. 197 . . 102
— Moore, 122 361
— Moore, 124, pl. 270 . . 567
— Moore, 835 (Pigot's Case) 5, 28, 39
— Owen, 31 252
— Owen, 38 288
— Owen, 60 223
— Palm. 403 41
— cited 2 Roll. Abr. 146, pl. 6 95
— 2 Roll. Abr. 147, pl. 11 . 93
— 2 Roll. Abr. 409 . . . 192
— cited 2 Roll. Rep. 23 . 79
— 2 Roll. Rep. 255 . . . 176
— 1 Salk. 44 160
— Sav. 71 83
— Sav. 127 314
— Sav. 712 310
— 1 Vent. 143 223
— 1 Vent. 257 . . 9, 10, 13
— 2 Vent. 365 397
— , Slingsby *v.* 418
Anscombe, Blaker *v.* 370
Anson *v.* Potter 69
— (Lord), Winter *v.* . . 208
Anstey, Cowper Smith *v.* . . 601
— , Saward *v.* 547
Anstis, *Re*, Chetwynd *v.* Morgan 589
Anstruther *v.* Adair 633
Antrobus *v.* Smith 54
Applebee, Edwards *v.* . . . 566
Arbitration between Walker and Others and Shaw, Son & Co., *Re* 135
Arbuthnot, Fyfe . . . 588, 602
— , Jolly *v.* 197
Archbold, Magrane *v.* 505
Archdall, R. *v.* 142
Archer *v.* Bennett 252
— *v.* Kelly . . . 595, 599
— *v.* Marsh 572

PAGE
Archer's Case . . . 310, 328
Arden's Settlement, *Re* . . . 415
Ardwick, Rosse *v.* 281
Arlington (Lord) *v.* Merricke . 191
Armitage, Cardigan (Earl of) *v.* 115, 247, 248
— Senior *v.* 133
Armitt *v.* Breame 176
Armorer, Wilson *v.* 284
Armote *v.* Bream 176
Armstrong, *Re* 346
— Brown *v.* 25
v. Cahill 513
Tullett *v.* 345, 349, 350, 352
— d. Neve *v.* Wolsey . 373
Army and Navy Auxiliary Co-operative Supply, Ltd., Drury, *v.* 240
Arnold, Adey *v.* 488
— *v.* Bidgood 274
— Coape *v.* 326
— Weston *v.* 240
Arnote *v.* Breame 176
Arthur *v.* Arthur 348
— Vyvyan, *v.* 486
— Warren *v.* 540
Arundell, Clifford *v.* . . . 229, 454
Ascue, Hollingworth *v.* 6, 11
Ash, Good *v.* 10
— Haths *v.* 164
— Nash *v.* 49, 368
Ashbie, Leventhorpe *v.* 334
Ashburner, Jackson *v.* . . . 52
Ashburton (Lord), Cholmondeley *v.* 401
Ashby, *Re*, Wreford, *Ex parte* . 344
— Hindson *v.* 235
Ashe, Hatter, *v.* 164
Ashford, Homer *v.* 572
Ashforth, *Re*, Sibley *v.* Ashforth 387, 388
— Sibley *v.* . . . 387, 388
Ashley, Harvey, *v.* 630
Ashton, Nash *v.* 552
Ashton, Trafford *v.* 453
— Williams *v.* 27
Ashwell *v.* Staunton 184
Askwith, D'Arcy *v.* 248
Aspden *v.* Sedden 258
Aspdin *v.* Austin . 116, 487, 489
Aspinall *v.* Duckworth 444
Astley *v.* Weldon 507
Aston, Harvey *v.* 465
— Nash *v.* 567, 568
— Woodward *v.* 29
Atcherley *v.* Du Moulin . . . 599
Atherton, Dennett *v.* . . 554, 557
Athill, *Re*, Athill *v.* Athill . . 69
Atkins, Aulton *v.* . . . 496, 498
Atkins, Devonshire (Duke of) *v.* 354
Atkinson *v.* Baker . . . 307, 355

PAGE
Atkinson, Liverpool Waterworks Co. *v.* 191
— Ritchie *v.* 539
— *v.* Smith, (3 De G. & J. 186) 204
— *v.* Smith, (14 M. & W. 695) 535
— Wilson *v.* . . . 415, 416
Atkyns *v.* Horde 79
— *v.* Kinnier . . . 506, 572
Atlee, Beddington *v.* . . . 255, 270
Atter, Wilson *v.* 443
Attfield, Thompson *v.* 47
Attoe *v.* Hemmings 90
Att.-Gen. *v.* Boston (Corporation) 146
— *v.* Brazenose College . 141, 146
— *v.* Bristol (Mayor) . 146
— *v.* Cast-Plate Glass Co. . . . 59, 66
— *v.* Clapham . 63, 145
— *v.* Downshire (Marquis of) 123
— (Ireland), Drummond *v.* 63, 141
— *v.* Drummond . . . 141
— *v.* Ewelme Hospital 123, 145
— *v.* Farmer 123
— *v.* Fishmongers' Co. (Preston's Will) . 145
— Hamilton *v.* 145
— *v.* Hartley 146
— *v.* Hungate 123
— *v.* Jacobs Smith . . . 607
— *v.* Jones 145
— *v.* Murdoch . . . 146
— Newcastle Corporation, *v.* 141
— *v.* Parker . . 141, 147
— *v.* Rochester (Corporation of) 148
— *v.* St. Cross Hospital . 145
— *v.* St. John's Hospital 145
— Stiles *v.* 202
— *v.* Turner 123
Attwell *v.* Harris 203
Attwood *v.* Attwood 412
— Jorden *v.* . . 262, 265
Audain, *Ex parte*, Licensed Victuallers' Mutual Trading Association, *Re* 73
Auditor Curle's Case 123
— King's Case 295
Audley's Case 374
Aulton *v.* Atkins . . . 496, 498
Austen *v.* Taylor 330, 610
Austin, Aspdin *v.* . . 116, 487, 489
— Harrison *v.* 48
Australian Joint Stock Bank, Ltd. *v.* Bailey 183
Aveline *v.* Whisson 5
Aveling *v.* Knipe 396
Avery *v.* Langford 573

PAGE
Avery, Scott *v.* 533
Awdwick, Roos *v.* 281
Awister, Dyer *v.* 53
Ayers, Fain *v.* 567
— Haddon *v.* 520
Ayerst *v.* Jenkins 411
Aylesford (Earl of), Fearon *v.* . 538
Ayliff *v.* Scrimshire . . 50, 510
Ayloffe *v.* Scrimpshire . . 50, 510
Ayray's (Doctor) Case . 178, 179
Ayres, Swain *v.* 52
— Vicars Choral de Litchfield *v.* 222

B.

B., Grimesby (Prior of), *v.* . . 445
Babbage *v.* Coulburn . . . 534
Babbington, Allen *v.* 540
Babham, Reps *v.* . . 313, 314
Bache *v.* Proctor . . 83, 88
Bacheler, Colgate *v.* 570
Back *v.* Andrew 395
Backhouse, Allan *v.* 453
— *v.* Mellor 172
— *v.* Middleton . . 453
Baron *v.* Waller 164
Badcock, *Re*, Kingdon *v.* Tagert . 630
Baddeley *v.* Baddeley . . . 347
Badger *v.* Ford 254
Badische Anilin und Soda Fabrik *v.* Schott Segner & Co. . 574, 576
Baggett *v.* Meux . . 347, 350
Bagshaw *v.* Spencer . 328, 335, 427
Bagwell, Cobden *v.* 477
Bailey, Australian Joint Stock Bank, Ltd. *v.* 183
— Edwards *v.* . . . 47, 49
— Keppell *v.* 389
— *v.* Lloyd . . . 181, 185
— *v.* Wright . . 401, 409
Baillie *v.* Jackson 481
— *v.* Treharne 606
Bain *v.* Cooper 192
Bainbridge, Campbell *v.* . 584, 586
Baines *v.* Geary . . 574, 576, 577
Bainton *v.* Bainton 380
— *v.* Reg. 359
Baird, Tunbridge Wells (Mayor &c. of), *v.* 236
Baker, *Re*, Pursey *v.* Holloway . 317
— Atkinson *v.* . . 307, 355
— *v.* Bayley . . 357, 358
— *v.* Bradley 350
— *v.* Bulstrode 568
— Calvert *v.* 38
— *v.* Dewey 207
— Hamilton *v.* 148
— *v.* Hedgecock . 502, 575, 576
— Hunt *v.* 335

PAGE
Baker, Johnson *v.* 17
— *v.* Lade, and Lade *v.* . 48
— *v.* Lane 48
— Marshall *v.* 426
— *v.* Richardson 218
— Searle *v.* 376
— Smith *v.* . . . 569, 580
— *v.* White 369
Baldwin, Garth *v.* 335
— *v.* Mortin 290
— *v.* Smith 328
Baldwin's Case 296
Baldwyn *v.* Marton 297
Bale, Manlove *v.* 128
— Stone *v.* 175
Balfour *v.* Cooper 454
Balkis Consolidated Co. Ltd., *Re* 8
Ball *v.* Dunsterville 7
— Seybrooke *v.* 164
Ball's Trust, *Re* 415
Balmain *v.* Shore 479
Bamberger *v.* The Commercial Credit 42
Bamfield *v.* Popham 338
Bamford, Brown *v.* 351
— *v.* Hayley 87
— *v.* Iles 191
Bandy *v.* Cartwright 499
Bank of China *v.* American Trading Co. 536
Bank of England Case . . . 396
— Law Guarantee and Trust Society *v.* . . . 394
— (Governor & Co.) Staple (Mayor, etc.) *v.* . 11, 13
— Suffell *v.* 39, 40
Bank of Hindostan *v.* Smith 37, 38
Bankes, *Re*, Reynolds *v.* Ellis 605, 635
— Floyer *v.* 385
— *v.* Le Despencer . . . 620
— *v.* Small 567
Banks *v.* Brown 164
— Mills *v.* 453
Banner, Highway *v.* . . 614, 615
Barbat *v.* Allen 142
Barber's Settled Estates, *Re* 354, 357, 358
Barclay, Burton *v.* . . . 274, 293
Bardon *v.* Bardon 470
Barfoot *v.* Freswell 489
Baring *v.* Abingdon 251, 252, 254, 255
Barker, Farrer *v.* 465
— *v.* Freeman 84
— *v.* Keat, Keate or Keete 78, 206
— *v.* Lade 48
— Middleton *v.* 330
— Roberts *v.* 133
— Underwood & Son, Ltd. *v.* 573, 576

PAGE
Barkham, Brown *v.* 109
— Newcomen *v.* . . 109
Barkley, Jones *v.* . . . 530
Barksdale *v.* Morgan . . 57, 158
Barkshire, Dixon *v.* 481
— *v.* Grubb . 260, 261
Barlow *v.* Bateman . . . 178
— *v.* Heneage . . 14, 15
— Reeves *v.* . . . 510
— *v.* Rhodes . 219, 252, 260
— Turner *v.* . . 157, 159
Barnard, *Re*, Barnard *v.* White . 634
— Gravely *v.* . . 504, 573
— *v.* White, Barnard, *Re* . 634
Barneby, Higginson *v.* . . . 628
Barned's Banking Co., *Re* . 13, 35, 36
Barnes, Gould *v.* . . . 178, 179
— Hoare *v.* 414
— *v.* Jennings 382
— *v.* Loach 271
Barnett *v.* Blake . . 317, 473
— Perry *v.* 137
Barnhart *v.* Greenshields . . 209
Baron, Pearse *v.* . . 626, 627
Barraclough *v.* Shillito . . . 423
Barratt *v.* Wyatt . . . 186
Barret *v.* Blagrave . . . 504
Barrett *v.* Bedford . . 121, 501
— Hammond *v.* . . . 344
— Leggott *v.* . . 125, 182
— Morris *v.* 396
Barrington, Galley *v.* 87, 91, 316
Barron *v.* Barron . 352, 357, 428
Barrow *v.* Barrow 606
— *v.* Dyster . . . 136
Barry, Swiney *v.* 37
Barrymore *v.* Ellis . . . 351
Barter, *Ex parte* 344
Bartholomew, Drybutter *v.* . 12
— Ehrman *v.* . 576, 577
Radcliffe *v.* . . 168
— Roper *v.* . 504, 505
Bartlett *v.* Green 335
— *v.* Hodgson . . . 488
v. Phillips . . . 304
Rose *v.* 231
— *v.* Wright . . . 216
Barton *v.* Dawes . . 126, 217
— *v.* Fitzgerald 76, 121, 501, 552
— Gibson *v.* 155
— Harrison *v.* . . . 396
— Horne *v.* 626
Barwick's Case . . 163, 383, 384
Baskerville *v.* Baskerville . . 615
Bass, White *v.* 265
Basset *v.* Thomas . . . 52
Bastard, Polden *v.* . . 256, 267
— *v.* Proby . . . 614
Bastin *v.* Bidwell 540
Bateman, Barlow *v.* . . . 178
— Cox *v.* 488

PAGE
Bateman (Lady) *v.* Faber . . 197
— *v.* Hunt 208
— *v.* Ross (Countess of) . 413
Bates *v.* Grabham . . . 34
— , Proud *v.* 247
Bath, Mountague *v.* . . . 78
— (Marquis of), Wickham *v.* 21
Bath's (Bishop of) Case . . 343
Bath and Mountague's Case . 181
Bathurst *v.* Errington . . . 429
Baumvoll Manufactur von Scheibler *v.* Furness . . 86
Baumvoll Manufactur von Scheibler *v.* Gilchrist & Co. . 86
Baxendale *v.* North Lambeth Liberal and Radical Club, Ltd. 246
Baxter *v.* Doudswell . . . 353
— Kelner *v.* 502
— M'Laren *v.* . . . 179
Bayley, *Re* . . . 352, 357
— Baker *v.* . . . 357, 358
— *v.* Great Western Ry. Co. 258
260
— *v.* Morris 310, 329, 339, 392
— Williams *v.* . . . 200
Bayley's Settlement, *Re* . 435, 439
Bayliss, Wadley *v.* . . . 141
Bayly *v.* Garford . . . 42
Baynes *v.* Belson 206
— & Co. *v.* Lloyd & Sons . 499
Baynham *v.* Guy's Hospital 147, 501
Bayntun *v.* Watton . . . 164
Bayspoole *v.* Collins . . . 203
Beachey, *Re*, Heaton *v.* Beachey 232
Beale *v.* Beale . . . 417, 434
Beamont, Villers *v.* . . 203, 373
Beaufort (Duke of) *v.* Swansea (Mayor of) 143, 145
Beaumond, Newman *v.* . . 170
Beaumont *v.* Field . . . 110
v. Salisbury (Marquis of) . . 46, 52, 371
Beavan *v.* Delahay . . . 133
Becher, Hungerford *v.* . . 198
Beck, Adams *v.* 437
Beck's Case . . . 338, 339
Beckett *v.* Addyman . . . 19
— *v.* Leeds Corporation 234, 236
Beckford *v.* Cruttwell . . . 62
Beckwith's Case . . 83, 373, 374
Beddington *v.* Atlee . . 255, 270
Bedell's Case . . 50, 204, 206
Bedford (Duke of) *v.* Abercorn (Marquis of) . . . 626, 627, 628
Bedford, Barrett *v.* . 121, 501
— *v.* Russell . . 320, 375
Bedford's (Earl of) Case. . . 375
Beecham, Chapman *v.* . . 176
Beechey, Goblet *v.* . . . 59
Beer *v.* Beer 517
Beere, Woodley *v.* . . . 287

PAGE
Beeton, White *v.* 536
Behrens, Montefiore *v.* 345
Bejushin, Colthirst *v.* . 301, 445
Belasyse *v.* Hester 166
Belcher, Green *v.* 452
— Macintyre *v.* 494
— *v.* Sikes . . . 84, 543
Belfast Dock Act, *Re* . 143, 144
Bell *v.* Bell 625
— Dawson *v.* 221
— O'Neill *v.* 135
— Sansom *v.* 182
Bellasis *v.* Hester 166
Bellasis' Trust, *Re* . . 395, 621
Bellhouse *v.* Mellor 172
Bellingham, Holmes *v.* 237
Bellman, Osborn *v.* 610
Bellringer R. *v.* 147
Belson, Baynes *v.* 206
Bendy, *Re*, Wallis *v.* Bendy . 588, 600
Benecke, Spartali *v.* 136
Benicombe and Parker's Case . 51
Bennet *v.* Bennet 431
— , Hughes *v.* 547
Bennet's Case 567
Bennett, Archer *v.* 252
— Catton *v.* 506
— Lloyd *v.* 18
— Rigby *v.* 258, 271
Bensley *v.* Burdon 195
Benson *v.* Benson 488
— Carr *v.* 241
— Hall *v.* 153
Bent, Roffey *v.* 559
Benwell *v.* Inns 573, 577
Benyon, Berens *v.* 583
Berens *v.* Fellowes 317
Berens' Trusts, *Re*, Berens *v.* Benyon 583
Beresford *v.* Browning . . . 514
Beresford's Case . . 306, 310, 339
Berkeley *v.* Hardy 24
— Wollaston *v.* 376
— *v.* York (Archbishop) . 31
Berkley, Willion *v.* . 118, 122, 302
Berkly, Foote *v.* . . . 193, 194
Bernard *v.* Bonner . . 274, 296
Berridge, Jervis *v.* 129
— *v.* Ward 233
Berry and Goodman's Case . . 236
Berwick (Mayor, &c. of), Sanderson *v.* 554, 555
Berwick's Case 163
Besis, Dockray *v.* 216
Besset, Gudgen *v.* 17
Best, Stratton *v.* 392
Best's Settlement Trusts, *Re* . 408
Bestall *v.* Bunbury 348
Beston, Browning *v.* . . . 122, 303
Bethell, Savill Bros., Ltd. *v.* 102, 119, 364, 383, 386

PAGE
Bettini *v.* Gye 537
Betts *v.* Burch 505, 507
Bettuan's Case 359
Beverley, Garland *v.* 318
Beviss, Kinglake *v.* 145
Bewley, Noel *v.* 568, 580
Bickers, Clarke *v.* 513
Bickerstaffe, Hayes or Hays *v.* 540, 560
Bickerton *v.* Walker 208
Bickford, Warn *v.* 567
Biddulph *v.* St. John 159
Bidgood, Arnold *v.* 274
Bidwell, Bastin *v.* 540
Bigge, Treloar *v.* 488
Biggins *v.* Tytherton 94
Biggs, Leicester *v.* . . . 80, 82, 369
— Sadlier *v.* 144, 147
Bignold, Ellison *v.* 485
— Viney *v.* 533
Billinghurst, R. *v.* 179
Billingsly *v.* Hersey 102
Billson *v.* Crofts 196
Bingham, Lewis *v.* . . . 30, 34
Bingham's Case 319
Binns, Swallow *v.* . . . 476, 481
Bipus *v.* Milford . 109, 325, 373, 375
Bircham, Withers *v.* 519
Bird, *Re*, ... 342
— Harper *v.* 486
— *v.* Lake 183, 504
— Morley, *v.* 396
Birkbeck, Harker *v.* 241
Birkhead, Clift *v.* . . . 378, 380, 381
Birks, *Re*, Kenyon *v.* Birks . . 427
Birland's Trustee *v.* Steel Bros., Ltd. 389
Birmingham Canal Co. *v.* Cartwright 386
Birmingham, Dudley and District Banking Co. *v.* Ross . 269
Biron's Contract, *Re* 426
Birtwistle *v.* Vardill 419
Bishop *v.* Elliot 230
— Hunt *v.* 278
Bittlestone *v.* Cooke 196
Black, Willis *v.* 607
Blackburn, Harrison *v.* . 229, 230, 232
— Palmer *v.* 73
— *v.* Stables . 612, 613
Blackburne *v.* Hope Edwards . 454
Blackett *v.* Royal Exchange Assurance Co. 132, 134
Blackman, Ponesley *v.* 51
— Wyth *v.* . . . 416, 422
Blackmore, L. & S. W. Ry. Co. *v.* 192
— Mathew *v.* 116
— Morton *v.* 344
Blagrave, Barret *v.* 504
Blain, Heelis *v.* 68
Blair, Doungsworth *v.* 229
Blake, *Ex parte* 598, 606

PAGE
Blake, *Re* 89
Blake, Barnett *v.* . . . 317, 473
— *v.* Blake 358
— *v.* Blake, Jones d. . . . 356
— Dillon *v.* 617
— *v.* Luxton . . . 354, 358
— *v.* Woolf 556
Blaker *v.* Anscombe 370
Bland *v.* Inman 23
Bland's Settlement, *Re*, Bland *v.* Perkin 598
Blandford *v.* Marlborough . 65, 612
Blankley *v.* Winstanley . . . 147
Blantern, Collins *v.* 138
Blaunket *v.* Simonson . 80, 292, 302
Blesard *v.* Simpson 308
Blethen, Exchange Bank of Yarmouth *v.* 21
Blockley, *Re*, Blockley *v.* Blockley 593
Blodwell *v.* Edwards 420
Bloomfield *v.* Johnson . . . 236
— Walcott *v.* 441
Bloxam *v.* Clutterbuck, Clutterbuck's Settlement, *Re* . . 588, 600
Blundell *v.* De Falbe 414
— *v.* Stanley 278
Blunden, Herbert *v.* 610
— *v.* Wood 17
Blunt *v.* Heslop 169
Blythe *v.* Granville 598
Blytheman *v.* Blytheman . . . 361
Boddington *v.* Robinson . . . 296
Boghurst, Prebble *v.* . 504, 505, 591, 616
Boileau, Edge *v.* 540
Bois *v.* Roswell 397
Bold *v.* Hutchinson 629
— *v.* Molyneux 75
Bole, Smith *v.* 164
Bolger *v.* Mackell 464
Bolland, *Ex parte*, Clint, *Re* . 509, 587
Bolt, Daffern *v.* 336
Bolton *v.* Bolton . . . 253, 256, 264
— *v.* Carlisle (Bishop of) . . 30
— *v.* Lee 513
— (Duke of) *v.* Williams . . 79
Bombay Burmah Trading Corporation *v.* Dorabji Cursetji Shroff 178
Bond *v.* Gonsales 134
— *v.* Taylor 412
— *v.* Walford . . . 19, 412
Bond's Case 460
Bonham, Repps *v.* . . . 313, 314
Bonner, Bernard *v.* . . . 274, 296
Bony *v.* Taylor . . . 301, 310, 329
Boone *v.* Eyre . . . 486, 535, 540
— Kidd *v.* 500
Booth *v.* Alcock 255
— Cooke *v.* 57, 147
— Matson *v.* 34
— Reilly *v.* 246

PAGE
Boothby, Bristow *v.* 385
Boots Cash Chemists, Ltd., Harris *v.* 511
Boraston *v.* Green 133
Boraston's Case 383
Bordieu, Campbell *v.* 134
Borelly, Christie *v.* 529
Boreton *v.* Nicholls . . . 338, 339
Born *v.* Turner 269
Boroughe's Case 112
Borrowes *v.* Borrowes 489
Bosnall *v.* Harvey 325
Bostock, St. Saviour's (Wardens of) *v.* 191
Boston (Corporation), Att.-Gen. *v.* 146
— Lawrance *v.* 113
Bosville, Glenorch (Lord) *v.* . . 613
Botfield, Bradburne *v.* . . . 518
Bottomley *v.* Forbes 134
Bottrell *v.* Summers . . . 192, 207
Boughton *v.* Boughton 14
— *v.* Sandilands . 180, 410
Bould *v.* Wynston 206
Boulton, Commercial S.S. Co. *v.* . 160, 163
— Keay *v.* 334
Bourne *v.* Gatliff 62
Bowden, Judson *v.* 528
Bower *v.* Hodges 486
— *v.* Smith 588, 603
Bowes, Perry *v.* 22
— *v.* Shand 72
Bowker *v.* Burdekin 17
— Hutchinson *v.* . . . 72
Bowler *v.* Wolley 247
Bowles, *Re*, Amedroz *v.* Bowles . 385
— *v.* Poor or Poore . 292, 353
Bowles' (Lewis) Case . . 325, 427
Bowman *v.* Nichol. 37
— *v.* Rostron 194
— *v.* Taylor. 194
Bown, *Re* 351
Bowring, Standing, *v.* 15
— Wellman *v.* . . . 407
Boyce *v.* Edbrooke 511
— *v.* Hanning 387
Boycot *v.* Cotton 460, 461
Boyd *v.* Petrie 183
— Saunders, *v.* . . . 435, 437
Boydell *v.* Walthall 360
Boyes, Spencer *v.* 568
Boyleson, Jones *v.* 411
Boyne, Brenan *v.* . . . 352, 357
Boys *v.* Ancell 505, 507
Bozoun's Case 123
Brace, Lee (or Leigh) *v.* . 77, 338
Brachen, Tunstall *v.* 461
Bradburne *v.* Botfield . . . 518
Braddyll, Wilson *v.* . . . 50, 510
Bradford, Dublin and Kingstown Ry. Co. *v.* . 215, 224

PAGE
Bradford, Emmins *v.* . 415, 416
— *v.* Romney . . . 598
— *v.* Williams . . 535
Bradlaugh, Clarke *v.* . 161, 162
Bradley, *Re* . . . 403, 404
— Baker *v.* . . . 350
— Chapman *v.* . . . 411
— *v.* Newcastle-on-Tyne (Pilots) 147
— *v.* Powell . . . 461
— Ward *v.* 336
Bradshaw *v.* Eyre . . . 254
Bradstreet, Devereux *v.* . . 159
Bragg, Merceron *v.* . . . 113
Braithwaite, Teasdale *v.* . . 204
Bramhall *v.* Hall . . . 53
Branckelow S.S. Co. *v.* Lamport and Holt . . . 160, 163
Brand *v.* Todd . . 101, 103, 123
Brandon *v.* Brandon . . . 398
— Flint *v.* 27
— *v.* Robinson . . . 345
Brandreth, Lucas *v.* (No. 2) 330, 342, 400
Brandwood, Hampson *v.* . 426, 619 456
Brassey, Pott *v.* . 583, 588, 604, 605
Brathwaite *v.* Brathwaite . 417, 431
Braunstein *v.* Accidental Death Insurance Co. . . . 533
Bray, Chitty *v.* . , . . 537
Braybroke (Lord) *v.* Inskip . 193
Brazenose College, Att.-Gen. *v.* 141, 146
Brazilian Submarine Telegraph Co., Chatenay, *v.* . . . 633
Breach, Sandiman *v.* . . 231
Bream, Armote *v.* 176
Breame, Armitt *v.* . . . 176
— Arnote, *v.* . . . 176
Bremridge, Evans *v.* . . . 19
Brenan *v.* Boyne . . . 352, 357
Brennan *v.* Fitzmaurice . . 618
Brent's Case . . . 393, 445
Bret *v.* Bridman . . . 338
Brett *v.* Cumberland . . . 22
— *v.* Pildredge . . . 338
— Roberts *v.* . . 523, 526, 532
Brew *v.* Haren 145
Brewer, *Re*, Morton *v.* Blackmore 344
— Hammond *v.* . . . 172
— *v.* Hill 52
Brewin *v.* Brewin 456
Brewster *v.* Angell . . 625, 626
Briard, Phillips *v.* 135
Brice *v.* Carre 491
— *v.* Curr 491
Bricknell, Tewkesbury (Bailiffs, &c.) *v.* 147
Bridge *v.* Bridge . . . 54
— Reynolds *v.* . . . 506
PAGE
Bridgman *v.* Green . . . 204
Bridman, Bret *v.* 338
Brigg *v.* Brigg . . 304, 400, 619
Briggs, Laird *v.* . . . 67, 78
— *v.* Upton . . . 409
— White *v.* . . 587, 615
Bright *v.* Cowper . . . 532
— Thornton *v.* . . . 582
Bristol (Mayor), Att.-Gen. *v.* . 146
Bristow *v.* Boothby . . . 385
— Lucas *v.* 135
— *v.* Warde . . 615, 623
Britain *v.* Rossiter 169
British Land Co., Plumstead Board of Works *v.* . . 233, 235
Broadmead *v.* Wood . . . 435
Brocklehurst, Wardle *v.* . . 258
Brodhurst, Powell *v.* . . . 517
Brodrick *v.* Brown . . . 53
Broke *v.* Smith . . . 27, 128
Broking *v.* Cham . . . 561
Bromley, Henfree *v.* . . 37, 42
— Primrose *v.* . . . 514
Brooke, Donoghue *v.* . . 423, 425
— *v.* Haymes . . 196
— *v.* Pearson 344
Brookeing, Crooke *v.* . . . 416
Brookes *v.* Drysdale . . . 483
— Millership *v.* . . . 18
Brookesby, Cave *v.* . . . 561
Brooking, Allhusen *v.* . . 52
Brookman *v.* Smith . . . 301
Brookman's Trust, *Re* . . 607
Brooks *v.* Brooks . . . 289
— *v.* Keith . . 583, 588, 599
Broomfield *v.* Williams . . . 270
Brough *v.* Whitmore . . . 134
Brougham, Melbourne Banking Corporation *v.* 198
Broughton *v.* Broughton, Coghlan, *Re* 591
— *v.* Conway . 120, 543
— Edwards *v.* . . 581
Brown, *Ex parte*, Stephenson, *Re* 344
— *v.* Alabaster . . . 260
— *v.* Armstrong . . . 25
— *v.* Bamford . . . 351
— Banks *v.* 164
— *v.* Barkham . . . 109
— Brodrick *v.* . . . 53
— *v.* Brown . . . 541
— *v.* Byrne . 70, 73, 132, 136
— Cattlin *v.* . . . 387
— Cuff *v.* 536
— Edwards *v.* . . . 197
— Guy *v.* 253
— Herring *v.* . . 54, 79
— Hutton *v.* 157
— *v.* Johnson . . . 163
— *v.* Jones 48
— *v.* Nichols . . . 253

PAGE
Brown, Pawson *v.* 411
— Pells *v.* 386
— *v.* Raindle 606
— Southampton (Lord) *v.* . . 24
— Southwel *v.* 6
— *v.* Spence 157
— Suffield *v.* . . . 264, 265
— Sury *v.* 112
— Thompson *v.* 532
— Upton *v.* . 376, 402, 403, 415
— *v.* Vawser 3
— Wakefield *v.* 521
— and Sibly's Contract, *Re* . 386
Browne *v.* Browne, Browne's Policy, *Re* . . . 393, 623
— *v.* Burton 174
— Burton *v.* 220
— *v.* Dunnery 113
— *v.* Foster 304
— Kenny *v.* 199
— Knight *v.* 344
— Lee *v.* 123
— Mara *v.* 376
— *v.* Phillips 507
— *v.* Taylor 54
Browne's Policy, *Re*, Browne *v.* Browne 393, 623
Browne's Will, *Re* 595
Browning, Beresford *v.* 514
— *v.* Beston . . 122, 303
— *v.* Wright. 501, 545, 550, 552
Brownlow (Earl), Egerton *v.* . 610
— *v.* Earl of Meath . 51
Bruen *v.* Bruen 456
Brumfitt, Thorpe *v.* 244
Brune *v.* Martyn 306
Brunel, Sibthorpe *v.* 528
Bruner *v.* Moore . . 155, 157, 159
Brunton *v.* Hall 245
Brushfield, Horres *v.* 558
Bryan *v.* Wetheread 252
Bryant, Williams *v.* 179
Brydges *v.* Chandos, Duchess of . 126
Brydone's Settlement, *Re* . 415, 416
Brymer, Thames Haven Dock Co. *v.* 531
Buck, Stroughill *v.* 196
Buckeridge, Long *v.* 364
Buckhurst *v.* Dacres 119
— Peerage Case . 306, 384
Buckland *v.* Buckland 198, 346, 604, 606
Buckle, Griffith *v.* 616
Buckler *v.* Hardy 282
— *v.* Millerd . . 106, 126
— *v.* Symons 361
Buckler's Case . . 282, 383, 384
Buckley *v.* Simonds 361
— Stafford *v.* 308
Bucknell, Right *v.* . . 195, 197
Buckwell, Jupp *v.* 395
Budd-Scott *v.* Daniell . 499, 555

PAGE
Bull *v.* Wyot 164
Bullen *v.* Denning 119
Buller, Carpenter *v.* . . 195, 196
Bullock *v.* Burdet, Burdett, or Burdot . . 102, 383
— Lloyds Bank, Ltd. *v.* . 209
— Tomlinson *v.* 161
Bulstrode, Baker *v.* 568
Bunbury, Bestall *v.* 348
Bunn *v.* Guy 571
Bunney, Thettenwell *v.* . . . 304
Bunning *v.* Lyric Theatre, Ltd. . 495
Bunny *v.* Hopkinson 549
Bunting *v.* Lepingwell . . 304
Burch, Betts *v.* . . . 505, 507
Burchell *v.* Clark . . 25, 79
— Dodd *v.* 267
Burchfield *v.* Moore 38
Burching *v.* Vaughan 93
Burdekin, Bowker *v.* 17
Burdet, Bullock *v.* . . .102, 383
Burdett, *Re*, Byrne, *Ex parte* . 502
— Bullock *v.* . 102, 383
— Powis *v.* . . 462, 482
Burditt, Castle *v.* 166
Burdon, Bensley *v.* 195
Burdot, Bullock *v.* . . 102, 383
Burford-Hancock, Malcolm *v.* . 412
Burgess *v.* Wheate 330
— Williams *v.* 168
Burgh, Harper *v.* 486
— *v.* Preston 27, 128
Burness, Lawson *v.* 72
Burnet, Henning *v.* 244
Burnett *v.* Lynch 499
Burrell, Routledge *v.* 7
— Williams *v.* 498
Burron, Low *v.* . . 357, 358
Burrows *v.* Lang 258
— Wheeldon *v.* 256, 264, 265, 268, 271
— Woolmore *v.* . 615, 619
Burtenshaw, Weston *v.* 84, 109, 322
Burton, Abbot *v.* 78, 320
— *v.* Barclay . . 274, 293
— Browne *v.* 174
— *v.* Browne 220
— *v.* Nichols . . 338, 339
— *v.* Rigby 315
— Trew *v.* 40
— *v.* Woodward 158
Bury, Osbrey *v.* 449
— Taw *v.* 11
Bush *v.* Calis, Cole or Coles . . 486
— *v.* Locke 320
Bushel *v.* Pasmore 17
Bussell, Waugh *v.* 39, 88
Bussey or Bussy, Hodgeson, Hodgson or Hodsel *v.* . 77, 335
Bustard *v.* Coulter 86
— *v.* Saunders 395

PAGE
Butcher *v.* Butcher (14 Beav. 222) 585, 601
— *v.* — (1 B. & P. N. R. 113) . . 192
— *v.* — (1 V. & B. 79) 431
— Cecil *v.* 15
— Harslet *v.* 547
— Smith *v.* 67
— Thompson *v.* . . . 27, 128
— Tomson *v.* . . . 27, 128
Butler *v.* Dodton . . . 86, 283
— *v.* Duncomb . . 77, 461, 462
— *v.* Fincher . . 164, 179
— *v.* Powis 504
— Shafto *v.* . . . 349, 352
— *v.* Stewkly or Stukely . 115, 225, 226, 282
— *v.* Swinnerton 557
— and Baker's Case . . 11, 19
Butterfield *v.* Heath . . . 204
— Williamson *v.* . . . 580
Buttery, Inglis *v.* 64
Button *v.* Wrightman . . . 179
Buxton, Mounsey *v.* 342
Byers, Thiis *v.* 163
Byne, Tanner *v.* 203
Byrne, *Ex parte*, Burdett, *Re* . 502
— Brown *v.* . 70, 73, 132, 136
— Wall *v.* 356
— Ward *v.* . . . 576, 577
Byrom *v.* Thompson . . . 34, 39
Byron, Hall *v.* 254
Bywater, *Re*, Bywater *v.* Clarke . 80

C.

Cabel, Scovel *v.* 281
Cabell *v.* Vaughan 6
Cadwallader, Thomas *v.* 486, 488, 539
Cahill, Armstrong *v.* 513
Caister *v.* Eccles 497
Caldwell *v.* Fellowes . 586, 589, 606
— *v.* Parker 40
— Taylor *v.* 130
Caledonian Insurance Co. *v.* Gilmour 533
— Ry. Co. *v.* Sprot . . 258
Calis, Bush *v.* 486
Calmady *v.* Rowe 145
Calow, Flinn *v.* 126
Calthorp's Case 101
Calthrop *v.* Heyton . . 554 555
Calvert *v.* Baker 38
— *v.* Sebright . . 556, 562
Cambridge (Mayor of) *v.* Dennis 191
Camelford, Smith *v.* 448
Campbell *v.* Bainbridge . 584, 586
— *v.* Bordieu 134
— *v.* Ingilby . . 537, 630
— *v.* Jones 527
PAGE
Campbell *v.* Prescott . 376, 472, 473
— Pym *v.* . . . 17, 138
— *v.* Sandys 354, 358, 449, 624
— *v.* Strangeways . . 162
Campbell's Policies, *Re* . . 590, 591
Campden Charities, *Re* . 145, 146
Campian's Case 224
Canham *v.* Fisk 258
Cann, Ringer *v.* . . . 230, 232
Cannan, Duncan *v.* . . . 587, 634
Cannock *v.* Jones. 486
— Jones *v.* 528
Cannon *v.* Villars . . . 64, 243
Canon's Case 338
Canterbury (Archbishop), R. *v.* . 141, 148
Canterbury, Mayor of *v.* Wood . 153
Cantle, Morris *v.* 334
Capital, &c., Association, *Re* . 78
Capper, Fry *v.* 386
— R. *v.* 123
Cardigan (Earl of) *v.* Armitage 115, 247, 248
Carew's Case . . 19, 281, 286
Carey, Macnamara *v.* . 184, 186
Carie's Case . . 19, 281, 286
Carier *v.* Franlin 363
Carlisle (Bishop of), Bolton *v.* . 30
— Case of the Corporation of the Cathedral Church of . 179
Carnegie, Northern *v.* . 352, 354, 375
Carnes *v.* Nesbitt 507
Carpenter *v.* Buller . . 195, 196
— *v.* Cresswell . . . 537
— Doidge *v.* 255
— Fausset *v.* 273, 276, 277, 278
— *v.* Parker 562
Carr *v.* Benson 241
Carr, Hill, Holles or Hollis, *v* . 198, 484, 489
Carr *v.* Roberts 490
Carre, Brice *v.* 491
Carrick, Ralph *v.* 68, 421
— Wandesford *v.* . . . 437
Carroll, Savage *v.* 438
Carruthers *v.* Sheddon . . . 179
Carstairs, Rickman *v.* 45
Carter *v.* Carter (3 K. & J. 617) 196, 278
— *v.* — (L. R. 8 Eq. 551) . . 590
— Combe *v.* 509
— *v.* Ducie (Earl) . 433, 439
— *v.* Kungstead . . . 360
— *v.* Madgwick 295
— Pyer, *v.* . 256, 265, 268
— Scargill 536
— *v.* Straphan 12
— White *v.* . . . 611, 613
— Williams, *v.* 626
Carter's Trusts, *Re* . . 127, 194

PAGE
Cartier, Howgrave *v.* . 476, 481
Cartwright, Bandy *v.* . . . 499
— Birmingham Canal Co. *v.* . . 386
— *v.* Cartwright . . 343
— Hebblethwaite *v.* 314, 418
— Plowden *v.* . . 52
Casbard, Hellier *v.* . . . 486
Case del Alton Woods . 123, 306
Case of the Corporation of the Cathedral Church of Carlisle . 179
Case of Mines, R. *v.* Northumberland 123
Cassidy, Kerr *v.* . . 352, 356
Casson, Withes *v.* . . . 193
Castle *v.* Burditt 166
— *v.* Dod . . . 352, 375
— Steel and Iron Works Co., Mowatt *v.* 11
— Trowel *v.* 26
Cast Plate Glass Co., Att.-Gen. *v.* 59, 66
Catesby's Case 158
Catomore, Tatum *v.* . . . 26
Catterson, Myers *v.* 269
Catterton, Lassels *v.* . . . 567
Cattlin *v.* Brown 387
Catton *v.* Bennett 506
— *v.* Simpson 38
Cavan (Lady) *v.* Pulteney . . 558
Cave *v.* Brookesby 561
— Tebb *v.* 555
Cawsy, Cornish *v.* . . 164, 166
Cawthorne *v.* Cordrey . . . 169
Cazenove, Hall *v.* 175
Cecil *v.* Butcher 15
Ceely, Richards *v.* 52
Central de Kaap Gold Mines, *Re* 154
Chabert, Forshaw *v.* 32
Chad *v.* Tilsed . 143, 144, 145
Chadwick *v.* Doleman . . 435, 438
— Smith *v.* 78
Chalkley, Young *v.* . . 505, 507
Chalmers *v.* North 404
Cham, Broking *v.* 561
Chamberlain, Cox *v.* 448
— *v.* Lloyd . . . 49
— *v.* Napier . 631, 634
— Nicholas *v.* . . 253
— *v.* Stanton, and Stanton *v.* . . . 12
Chambers, *Re* 50
— *v.* Chambers . . . 615
— Manning *v.* 345
— Mason *v.* 123
— *v.* Smith 169
— *v.* Taylor . 300, 310, 322, 328, 340, 342
Chandflower *v.* Waterhouse and Presbye 561
Chandless, Hall *v.* 34
Chandos (Duchess of), Brydges *v.* 126
Chandos (Duke of) *v.* Talbot . 464
Chandos' Case 123
Chanter *v.* Johnson 3
Chantflower *v.* Priestley . . 561
Chanudflower *v.* Prestley . . 561
Chaplain *v.* Southgate . . 560
Chaplin *v.* Chaplin . . . 353
— Southgate *v.* 560
Chaplin's Trust, *Re* . . . 443
Chapman *v.* Beecham . . . 176
— *v.* Bradley . . . 411
— *v.* Emery 202
— *v.* Gatcombe . . . 278
— Quicke *v.* 255
— *v.* Wood, Smith, *Re* . 351
Chappell, Wastneys *v.* . 357, 358
Charity Commissioners *v.* London Corporation . . . 236, 238
Charmer, Kell *v.* 65
Charnley, Woodford *v.* . . . 54
Charrington *v.* Laing . . . 507
Chartwell, Whitlock *v.* . . . 51
Chatenay *v.* Brazilian Submarine Telegraph Co. 633
Chattock *v.* Muller 98
Chawton, R. *v.* . 62, 78, 158, 159
Chedington's (Rector of) Case . 374
Cheiny and Langley's Case . 499
Chelsea Vestry, London Gas Light Co. *v.* . . . 524, 539
Cherry, Ferrars *v.* . . . 203
— *v.* Heming 5
Cheshire, Large *v.* . . . 535, 539
Cheslyn *v.* Dalby 491
Chesman *v.* Nainby . . 571, 575
Chester (Bishop of), R. *v.* 123, 180
— (Mayor of), R. *v.* . . . 147
— *v.* Willan, Willand, Willon or Wilson . 47, 49
Chesterfield Colliery Co. *v.* Hawkins 24
Chetham *v.* Williamson . . . 241
Chetwynd *v.* Morgan, Anstis, *Re* 589
Cheyney's (Lord) Case . . . 106
Chick, *Ex parte*, Meredith, *Re* . 46
— *v.* Smith 162
Chickell, or Chiggell, Goshawke *v.* 87, 294, 295
Child, Coker *v.* 24
— Cooker *v.* 24
— Irnham (Lord) *v.* . . 124, 127, 129
Childers *v.* Eardley . . 190, 581
— Mackenzie *v.* . . . 198, 390, 485, 491
Chilliner *v.* Chilliner . . . 504
Chilton *v.* Corporation of London 390
Chitty *v.* Bray 537
Cholmondeley *v.* Ashburton 401
— *v.* Clinton 45, 57, 64, 77, 109, 191, 193, 318

PAGE
Cholmondeley *v.* Meyrick . . 449, 462, 477
Chown, Smye *v.* . . . 310, 314
Chrismas, Standen *v.* . . . 500
Christchurch Inclosure Act, *Re* . 389, 390
Christian, Senhouse *v.* . . 245
— *v.* Whitaker, Whitaker, *Re* . . 346, 604
Christie *v.* Borelly . . . 529
— Fairlie *v.* 32
Christmas *v.* Oliver . . 194, 195
Chudleigh's Case . 313, 374, 375
Church *v.* King 514
Churchill *v.* Denny . 590, 593, 600
— *v.* Shepherd . . 595
Churchman, Osborn *v.* . . . 50
Churchward *v.* Reg. . . . 497
Chute, *v.* ——. 206
— Selby *v.* 555
City of London Brewery, Hall *v.* 499, 561
City of London Union Assessment Committee, Esdaile *v.* . . 148
Clanrickard *v.* Sidney . . 44, 565
Clapham, Att.-Gen. *v.* . 63, 145
Clapp, Mogridge *v.* . . . 53
Claridge, Seal *v.* . . . 21
Clark, Burchell *v.* . . . 25, 79
— *v.* Cogge . . 262, 263, 265
— Colmer *v.* 571
— Ells *v.* 94
— France *v.* . . . 35, 36
— Gibson *v.* . . . 223
— Goodwin *v.* . . . 337
— Machil *v.* 363
— Spencer *v.* 308
Clark's Case 166
Clark and Kempton's Case . . 83
Clarke, *Re*, Combe *v.* Carter . 509
— *v.* Bickers . . . 513
— *v.* Bradlaugh . 161, 162
— Bywater *v.* . . . 80
— *v.* Colls 414
— *v.* Franklin . . . 376
— Goodiar *v.* 337
— *v.* Gurnell . . . 532
— *v.* Hayne . . 403, 404
— Machell *v.* . . . 363
— Parker *v.* 208
— Robertson *v.* . . . 73
— *v.* Roystone . . . 133
— *v.* Rugge . 262, 263, 265
— *v.* Samson 500
— and Daye's Case . . 300
Clarkson *v.* Edge 504
— *v.* Hanway . . . 204
Clavell *v.* Littleton . . . 138
Clavering *v.* Clavering . 14, 15, 29
Clay, Zouch *v.* 34
— and Barnet's Case . . 216

PAGE
Clayton, Dart *v.* . . . 86, 190
— Dent *v.* . . . 86, 190
— *v.* Glengall 45
— *v.* Gregson . . 59, 72
— *v.* Kynaston . . . 50
Clayton's Case . 8, 163, 164, 166, 173
Cleer (Sir Edward) *v.* Parker . 53
Clement *v.* Henley . . . 24
Clements *v.* Lambert . . . 254
— *v.* Matthews . . 509
— *v.* Scudamore . . 353
Clementson, Hudson *v.* . . . 72
Clere (Sir Edward) *v.* Parker . 53
Clere's (Sir Edward) Case . . 53
Clerk, Machel, Machell or Machil, *v.* 363
Clerke *v.* Comer 571
— Counden *v.* . . . 318
— Goodier *v.* 337
— *d.* Prin *v.* Heath . . 41
Clifden (Lord), Hope *v.* . . . 481
Clifford *v.* Arundell . . 229, 454
— *v.* Turrill . . 201, 202, 203
Clift *v.* Birkhead . 378, 380, 381
— Phillips *v.* 537
Clifton *v.* Walmesley . . . 139
— Woodall *v.* . 385, 390
Clint, *Re*, Bolland, *Ex parte* 509, 587
Clinton, Cholmondeley *v.* 45, 57, 64, 77, 109, 191, 193, 318
Clinton's Trust, *Re* 592, 596, 598, 600, 602
Clipsham, Ecclestone *v.* . . 516
Clive *v.* Clive 616
Clough, *Ex parte*, Reis, *Re* 509, 587
Clowes, Griffin *v.* 18
Clutterbuck's Settlement, *Re*, Bloxam *v.* Clutterbuck . 588, 600
Clyde Navigation (Trustees of) *v.* Laird 148, 149
Coape *v.* Arnold 326
Coare *v.* Giblett 18
Coates, Tippins *v.* . . . 514
Cobden *v.* Bagwell 477
— Hardinge *v.* . . . 508
Cochin *v.* Heathcote . . 9, 290
Cochran, *v.* Graham . . . 607
— *v.* Retburg . . . 163
Cochrane, Ewart *v.* . 256, 257, 261
— James *v.* . 485, 496
Cockburn, *Ex parte* . . . 24
Cocker, Lloyd *v.* . . 479, 480
Codrington *v.* Lindsay . . 586
— Williamson *v.* . . 485
Cogan *v.* Duffield . . . 621
Cogge, Clark *v.* . . 262, 263, 265
Coghlan, *Re* 190
— *Re*, Broughton *v.* Broughton 591
Cohen *v.* Tannar . . . 563
Coker *v.* Child 24

PAGE
Coker, Farewell *v.* 193
— Hitchcock *v.* 572
Cole, Bush *v.* 486
— *v.* Knight 192
— Knight *v.* 192, 276
— *v.* Levingston 377
— Mouflet *v.* 577
— *v.* Parkin 37
— Pordage *v.* 494, 524, 526, 527, 529, 531, 535
— *v.* Sewell . 382, 385, 387, 388
— Sury *v.* 112
— Were *v.* 49
Cole's Case 486
Cole and Friendship's Case . . 445
Coleby, Russen *v.* 527
Coleman *v.* Sherman 515
Coles, Bush *v.* 486
— *v.* Coles 600
— *v.* Hulme 88
— *v.* Kinder 567
— *v.* Sims 504
— *v.* Trecothick 21
Coley, *Re*, Gibson *v.* Gibson . . 417
Colgate *v.* Bacheler 570
Coling *v.* Haden, Haden, *Re* . . 583
Collett, Marshall *v.* 408
— Meryon *v.* . . 407, 408
Colley's Trusts, *Re* 471
Collier, Lantsbery *v.* 387
— *v.* Squire . . . 406, 407
Collingwood *v.* Stanhope 432, 433, 435
Collins, *Ex parte*, Keen and Keen, *Re* 510
— Bayspoole *v.* 203
— *v.* Blantern 138
— Copley *v.* 158
— *v.* Locke 534
— *v.* Plummer 614
— *v.* Prosser . . . 42, 513
— White *v.* 310
Collis, Doe *v.* 427
Colliss *v.* Hector 634
Colls, Clarke *v.* 414
— Mitchell *v.* 414
Collyer, Holt *v.* 64
— *v.* Isaacs 508
Colmer *v.* Clark 571
Colmore *v.* Tyndall . . 45, 372
Cologan, Langhorn *v.* . . . 32
Colt & Glover *v.* Bishop of Coventry and Lichfield . . . 53
Colthirst *v.* Bejushin . . 301, 445
Coltman *v.* Senhouse . . 48, 359
Colton *v.* Senhouse . . 48, 359
Colville, Migotti *v.* 159
Colvin, Wilton *v.* 593
Colyear *v.* Musgrave . . . 606
Combe *v.* Carter, Clarke, *Re* . 509
Combe *v.* Combe . . 464, 466
— *v.* Pitt 161

PAGE
Combes, Hall *v.* 215
Comer, Clerke *v.* 571
Commercial Credit (The), Bamberger *v.* 42
— S.S. Co. *v.* Boulton . 160, 163
Compton *v.* Richards . 257, 266, 271
— Smith *v.* . . 546, 552
Condon, Lowther *v.* 461
Congreve, Douglas *v.* 582
Conmee, Taaffe *v.* 397
Conn, Eales *v.* 27, 128
Conolly *v.* Vernon and Vyse . . 214, 215, 219
Constable *v.* Nicholson . . . 390
Conway, Broughton *v.* . 120, 543
— Walpole *v.* 448
Cooch *v.* Goodman 7
Cook *v.* Cook 418
— *v.* Gerrard 378
— Idle *v.* . 300, 310, 313, 339
— *v.* Jennings 532
Cooke, *Ex parte* 345
— Bittlestone *v.* 196
— *v.* Booth 57, 147
— *v.* Founds 542
— *v.* Fuller 413
— Hockin *v.* 66
— & Bletcher's Contract, *Re* . 277
Cooker *v.* Child 24
Cookes *v.* Fowns 542
Coombes, Furnivall *v.* . 85, 501
Coombs, Manchester Brewery Co. *v.* 52
Cooper, *Re*, Cooper *v.* Vesey . 22
— Bain *v.* 192
— Balfour *v.* 454
— Davidson *v.* 29, 30, 37, 38
— Ellesmere Brewery Co. *v.* 33, 39
— *v.* Frankling, or Franklin and Waller, or Walter 363
— Hill *v.* 413
— Hills *v.* 95
— *v.* Kynock 371
— *v.* L. B. & S. C. Ry. . 536
— Peppin *v.* 191
— *v.* Robinson 175
— Spicer *v.* 72
— *v.* Thurman 293
— *v.* Turnman . . 79, 293
— *v.* Vesey, Cooper, *Re* . . 22
Cope *v.* Cope 81, 82
— *v.* de la Warr (Earl) . . 307
Copeland *v.* Stephens 18
Copland *v.* Laporte 513
Copley *v.* Collins 158
— Gilby *v.* 23
— *v.* Hepworth 52
Coppard, Hodgson *v.* 487
— Hodson *v.* 487

PAGE
Copper Miners, Wood *v.* . . 487
Coppin *v.* Coppin . . . 208
— Dillon *v.* 54
— Levick *v.* 274
Corbet *v.* Corbet . . 316, 317
Corbet's Case . . 84, 303, 384
Corbett *v.* Jonas 269
Cordrey, Cawthorne *v.* . . . 169
Cordwell *v.* Martin 37
Cork, Lambourne *v.* . . 192, 207
Corke, Lampon *v.* . . 192, 207
Corlett, Dimech *v.* 505
Cornfoot *v.* Royal Exchange Assurance Co. 163
Cornish *v.* Cawsy . . 164, 166
Cornmell *v.* Keith . . 589, 602
Cornwell, Aldous *v.* 39
Corp, Sturgis *v.* 348
Cort *v.* Sagar 218
Corus *v.* ——. 561
Coryat, Trinidad Asphalte Co. *v.* 195, 196
Coryton *v.* Helyar 76
Cosin (Cosins, Coson or Cozens), Tippin (or Tipping) *v.* 323, 326, 366, 375
Cother *v.* Merrick . . . 80, 81
Cottee *v.* Richardson 52
Cotterel *v.* Franklin 224
Cotton, Boycot *v.* . . 460, 461
— *v.* King 14
— *v.* Scarancke 400
Cotton's Case . . . 310, 314
Coulburn, Babbage *v.* . . . 534
Coulson *v.* Allison 411
— Newcomen *v.* . . . 244
Coulter, Bustard *v.* 86
Coulthard, Ecroyd *v.* 235
Coulthurst, Stanley *v.* 615
Coultman *v.* Senhouse . 48, 359
Counden *v.* Clerke 318
Coups, Lane *v.* 429
Courtail *v.* Thomas 31
Courtney, Haliwel *v.* 106
— *v.* Taylor 198, 199, 484, 491
Cousens *v.* Rose 245
Coutts, Danby *v.* 191
Coventry *v.* Coventry . 582, 583
— Swansborough *v.* 266, 271
— Waring *v.* 387
— and Lichfield (Bishop of), Colt and Glover *v.* . . . 53
Coward *v.* Gregory 539
Cowen *v.* Truefitt . . 226, 227
Cowie *v.* Halsall 38
— *v.* Harris 169
Cowlam *v.* Slack 251
Cowlard, Essery *v.* 411
Cowley, Amys *v.* 223
— *v.* Cowley 178
Cowlishaw *v.* Hardy . . 53, 127
Cowper, Bright, *v.* 532
— *v.* Frankline 363
— Lane, *v.* 429
— *v.* Scott 458
Cowper Smith *v.* Anstey . . 601
Cox *v.* Bateman 488
— *v.* Chamberlain 448
— *v.* Cox 627
— *v.* Day . . 173, 175, 176
— Kershaw *v.* 34, 39
— *v.* Matthews 257
Cracroft, Palmer *v.* 417
Craddock, Lake *v.* 396
Craig, *Re* 218
— Scottish Widows Fund *v.* 454
Cramer *v.* Moore 582
Cranmer's Case . . 325, 405
Crawshay, *Re*, Walker *v.* Crawshay 605
— Allin *v.* 377
— Walker *v.* 605
Crayford *v.* Crayford 547
Crealock, Heath *v.* 195
Crédit Lyonnais, Jacobs *v.* . 632
Cresswell, Carpenter *v.* 537
Creswick *v.* Hobson 314
Crew *v.* King 395
Crewe *v.* Dicken 19, 20
Creyke, Dawes *v.* 413, 591
Cripps, Waugh *v.* 312
Crisp *v.* Gamel 201
Crocker, Evans *v.* 164
Croft, Darcy *v.* 348
— *v.* Howel 179
Crofton *v.* Ormsby 630
Crofts, Bilson *v.* 196
— Elves *v.* 572
— *v.* Middleton 195
Crompton *v.* Jarratt 230
Cromwell *v.* Grimsdale . 5, 95, 175
— *v.* Grumsdale . 5, 95, 175
— *v.* Grunsden . 5, 95, 175
Cromwell's Case . 79, 129, 363, 367
Crone *v.* Odell 445
Croockewit *v.* Fletcher . . 32, 532
Crooke *v.* Brookeing 416
Crooke *v.* McTavish 157
Crosbie, Alexander *v.* . . . 183
Crosby *v.* Middleton 86
Cross *v.* Faustenditch 206
— Hogg *v.* . . . 281, 383
Crosse *v.* Young 561
Crossfield *v.* Morrison 547
Crossing *v.* Scudamore . . . 48
— *v.* Skidmore 48
Crossley & Sons *v.* Lightowler . 265
Crouch *v.* Waller . . 413, 414
Crowther *v.* Oldfield 254
Croxon, *Re* 178
Croydon Hospital *v.* Farley . . 179
Crumwell *v.* Grunsdale . 5, 95, 175
Cruttwell, Beckford *v.* 62

PAGE
Crux *v.* Aldred 506
Crystal Palace District Gas Co., Selby *v.* 245
Cubitt *v.* Porter 240
Cuff *v.* Brown 536
Cumberland, Brett *v.* . . . 22
— (Justices), R. *v.* . 169
Cumberland's (Earl of) Case . 290
Cumberlege *v.* Cumberlege-Ware, Ware, *Re* . . 601
— *v.* Lawson . . . 19
Cumming, Cuthbert *v.* . . . 134
Cummings, Hayne *v.* . . . 46, 483
Cunningham, Gower *v.* . . . 320
— *v.* Moody . . . 448
Cunynghame's Settlement, *Re* . 386
Cupit *v.* Jackson 453
Curle's (Auditor) Case . . . 123
Curling, Stavers *v.* . . . 523, 539
Curr, Brice *v.* 491
Currey, *Re*, Gibson *v.* Way . 605
Currie *v.* Larkins . 470, 477, 478
— *v.* Nind 204
Currin *v.* Doyle 352, 357
Curry, Wilmer *v.* 513
Curtis *v.* Price . . 324, 370, 371
Curzon (Lord), Perfect *v.* . . 475, 481
— Scarsdale *v.* 620
Cusack *v.* Cusack . . . 616, 618
Cussen *v.* O'Connor 573
Cussens, R. *v.* 159
Cuthbert *v.* Cumming . . . 134
Cuttler, Snowe *v.* 325

D.

Dabar, Taylor *v.* . . . 566, 579
Dacres, Buckhurst *v.* 119
— (Lady) *v.* Hazel . . . 206
Daffern *v.* Bolt 336
Dafforne *v.* Goodman . . 336, 416
Daintree *v.* Hutchinson . . . 72
Dakins *v.* Wagner 171
Dalby, Cheslyn *v.* 491
Dale *v.* Humfrey, and Humfrey *v.* 132, 135, 136
— Parry *v.* 95
Dallison, Wigglesworth *v.* . 66, 73, 133, 137
Daly, Renwick *v.* 285
Danby *v.* Coutts 191
Dancer, Leahy *v.* 203
Dand *v.* Kingscote . . . 245, 247
D'Angibau, *Re*, Andrews *v.* Andrews 606
Daniel, *Re* 192
— *v.* Dudley 406, 407
— *v.* Ubley (or Uply) . . . 52
— *v.* Upton 52
Daniel's Settlement Trusts, *Re* . 89
PAGE
Daniel's Trust, *Re* 583
Daniell, Budd-Scott *v.* . . 499, 555
— *v.* Woodroffe 48
Dann *v.* Spurrier . . . 103, 121
Dannock, Woodyard *v.* . . . 546
Danvers, Hunt *v.* . . . 554, 555
Danyel *v.* Ubley 53
D'Arcy *v.* Askwith . . . 248
Darcy *v.* Croft 348
— and Sharpe's Case . . . 39
Dare, Greenslade *v.* 209
Darling, Finlay *v.* . . 587, 588, 600
Darrell *v.* Gunter 55
Darson *v.* Hunter 254
Dart *v.* Clayton 86, 190
Darthez, Mitchell *v.* 532
Dashper *v.* Milburn 294
Dashwood, Parkinson *v.* . . . 581
Daubuz, Pye *v.* 566
Daure, Wilkins *v.* 282
Davenant *v.* Rafter 106
Davenport *v.* Davenport . . . 615
— *v.* Hanbury . 422, 428
— *v.* Marshall 413, 589, 591
— Mavor *v.* 488
— Thomson *v.* . . . 136
Davey *v.* Shannon 576
Davidson *v.* Cooper . 29, 30, 37, 38
— *v.* Gwynne 539
Davie, R. *v.* 147
— *v.* Sacheverell 561
— Whiskins *v.* 353
Davies, *Re*, Harrison *v.* Davis . 603
— *v.* Davies (4 Beav. 54) . 613
— *v.* — (36 Ch. D. 359) 109, 577
— Forster *v.* 588
— *v.* Games 396
— *v.* Huguenin 50, 434, 435, 457, 462
— *v.* Kempe 393
— Lawford *v.* 168
— Lewis *v.* 48
— *v.* Lowndes 178
— *v.* Penton . . . 505, 507
— *v.* Sear 266
— *v.* Speed 319, 377
— *v.* Tagart, Weston, *Re* 491
— *v.* Thomas 270
Davies' Policy Trusts, *Re* . . . 623
Davies and Williams *v.* Williams 120, 232
Davis, Elliot *v.* 5, 7, 19
— Gerry *v.* 95
— Harrison *v.* 603
— *v.* Jones 18
— *v.* Kirk 320
— *v.* Martin, Queensland Land and Coal Co., *Re* . . . 36
— *v.* Mason 571
— Rogers *v.* 172

PAGE
Davis, *v.* Speed . . 319, 377
— *v.* Tollemache . . 564, 566
— *v.* Town Properties Investment Corporation . . . 555
Davy *v.* Kemp 393
Dawes, *Ex parte*, Moon, *Re* 181, 185, 189, 275, 344
— Barton *v.* . . 126, 217
— *v.* Creyke . . 413, 591
— *v.* Tredwell 182, 184, 198, 489 492, 585, 587
Dawson, Anderson *v.* 406
— *v.* Bell 221
— *v.* Dawson 309, 352, 428
— *v.* Dyer 540
— *v.* Fitzgerald . 533, 534
Day, Cox *v.* 173, 175, 176
— *v.* Day 403
— *v.* Radcliffe . . 477, 479
— Right *v.* 337, 340
— *v.* Trig 231
— Wallis *v.* 574
Dean and Chapter of Ferne's Case 9, 10
Deane's Trusts, *Re* . . . 416
Dearberg *v.* Letchford . . 331
Dearden, *Re* 178
Debar, Taylor *v.* . . 566, 579
Debenham *v.* Digby . . . 232
De Croismar, Master *v.* . . 626
Deering *v.* Farrington . . . 497
De Falbe, Blundell *v.* . . 414
Deffell *v.* White 21
Delahay, Beavan *v.* . . . 133
De Lancey, Watkeys *v.* . . 561
Delany, Dennehy *v.* . 377, 623
De Lassalle *v.* Guildford . . 130
De la Warr (Earl), Cope *v.* . 307
— — *v.* Miles 144, 145
Delbridge, Richards *v.* . . 54
Delmer *v.* M'Cabe . 542, 565
Delobbel-Flipo, Morris *v.* . . 510
Dempsey, Norden Steam Co. *v.* . 137
Dendy *v.* Henderson . . . 573
— Simpson *v.* 144, 145, 233, 238, 239
Denis' Trusts, *Re* . 421, 425, 426
Denison *v.* Holiday . . . 192
Denn *d.* Warren *v.* Fearnside . 164
— *d.* Trickett *v.* Gillot . 313, 314
— *d.* Creswick *v.* Hobson . 314
— *d.* Wilkins *v.* Kemeys . . 52
Dennehy *v.* Delany . . 377, 623
Dennett *v.* Atherton . 554, 557
Denning, Bullen *v.* . . . 119
Dennington, Fitzhugh *v.* . . 160
Dennis, *Re* 464, 471
— Cambridge (Mayor of) *v.* 191
— *v.* Snape 94
Denny, Churchill *v.* . 590, 593, 600
Denny's Estate, *Re* . . 91, 316
Dent *v.* Clayton . . . 86, 190
Denton *v.* Fettiplace . . . 49
— & Goddards Case . 2, 6, 8
Derby, Rivers *v.* . . 457, 458
— (Earl of) *v.* Taylor . . 293
— Canal Co. *v.* Wilmot 9, 10, 11
Dering *v.* Kynaston . . . 589
De Ros' Trusts, *Re*, Hardwicke *v.* Wilmot . . 190, 583, 586
Derrett, Kemp *v.* 158
De Rutzen, Whiting *v.* . . 412
Desanges, Thomas *v.* . . . 162
D'Estampes, *Re*, D'Estampes *v.* Hankey 586
Detmold, *Re*, Detmold *v.* Detmold 344
Deux *v.* Jeffries 50
Deverell *v.* Whitmarsh . . . 207
Devereux *v.* Bradstreet . . 159
Devine *v.* Wilson 103
Devon's (Earl of) Case . . 306
Devonshire (Duke of) *v.* Atkins . 354
— — Neill *v.* . 119, 144, 145
— — *v.* Pattinson . . 235
Dewey, Baker *v.* 207
D'Hedouville, Hope *v.* . . . 376
Dicken, Crewe *v.* . . 19, 20
Dickenson, Robinson *v.* . . . 410
— Smith *v.* 507
— Tayleur *v.* 580
Dickinson *v.* Dillwyn . . 590, 601
Dickson *v.* Lough . . . 507
Dicksons, Wright *v.* . . . 88
Digby, Debenham *v.* . . . 232
— *v.* Jordan 164
— *v.* Mountford 93
— Van Grutten *v.* . . . 634
Digge's Case 22
Dighton, Thomlinson *v.* . . 53
— Tomlinson *v.* . . . 53
Dillam *v.* Frain 313
Dillon *v.* Blake 617
— *v.* Coppin 54
— *v.* Fraine 313
Dillwyn, Dickinson *v.* . 590, 601
Dimech *v.* Corlett 505
Divett, Powell *v.* 38
Dix, Hore *v.* 48
— Wats *v.* 48, 164
Dixon *v.* Barkshire . . . 481
— Stammers *v.* 145
— *v.* Terry 170
— Webb *v.* 103, 121
Dixon's Trusts, *Re*. 424
Dixwell, Roberts *v.* . . 318, 613
Doble, *Ex parte* 204
Dobson *v.* Keys . . 86, 92, 94, 175
Dockray *v.* Besis 216
Doctor Clea and his Chaplain . 158

PAGE
Dod, Castle *v.* 352, 375
— *v.* Dod 616
— Hamond *v.* 561
— *v.* Herbert 3
Dodd *v.* Burchell . . . 267
Doddington's Case . . 215, 226
Dodson *v.* Kayes (or Keyes) . 86, 92, 94, 175
Dodton, Butler *v.* . . . 86, 283
Dodwell *v.* Gibbs . 282, 285, 295
Doe *d.* Scholefield *v.* Alexander . 113
— *d.* Raikes *v.* Anderson . . 276
— *d.* Jackson *v.* Ashburner . . 52
— *d.* Lloyd *v.* Bennett . . 18
— *d.* Hall *v.* Benson . . . 153
— *d.* Kinglake *v.* Beviss . . 145
— *d.* Leicester *v.* Biggs 80, 82, 369
— *d.* Lewis *v.* Bingham . 30, 34
— *d.* Clift *v.* Birkhead 378, 380, 381
— *d.* Merceron *v.* Bragg . . 113
— *d.* Kerr *v.* Cassidy . 352, 356
— *d.* Tatum *v.* Catomore . . 26
— *d.* Spencer *v.* Clark. . . 308
— *d.* Were *v.* Cole . . . 49
— *v.* Collis 427
— *d.* Lewis *v.* Davies . . 48
— *d.* Cox *v.* Day . . 173, 175, 176
— *d.* Webb *v.* Dixon . 103, 121
— *d.* Tanner *v.* Dorvell . 378, 448
— *d.* Fonnereau *v.* Fonnereau 325
— *d.* Smith *v.* Galloway 215, 222, 226
— *d.* Spencer *v.* Godwin . 93
— *d.* James *v.* Hallett . 314, 418
— *d.* Bosnall *v.* Harvey . . 325
— *d.* Lee Compere *v.* Hicks . 369
— *d.* Hiscocks . . . 110
— *d.* Atkyns *v.* Horde . . 79
— *d.* Farmer *v.* Howe . . 232
— *d.* Reay *v.* Huntingdon . . 50
— *d.* Pell *v.* Jeyes . . . 230
— *d.* Garnons *v.* Knight . . 13
— *d.* Spicer *v.* Lea . . 66, 152
— *d.* Lewis *v.* Lewis . . . 356
— *d.* Douglas *v.* Lock . 246, 247
— *d.* Blake *v.* Luxton . 307, 354, 358
— *d.* Lyde *v.* Lyde . . . 334
— *d.* Lempriere *v.* Martin . . 354
— *d.* Willis *v.* Martin 91, 315, 448
— *d.* Brune *v.* Martyn . . 306
— *d.* Meyrick *v.* Meyrick 108, 188, 228
— *d.* Gord *v.* Needs . . . 106
— *d.* Christmas *v.* Oliver . 194, 195
— *d.* White *v.* Osborne . . 188
— *d.* Lloyd *v.* Passingham . . 366, 367
— *d.* Mansfield *v.* Peach . . 22
— *d.* Pring *v.* Pearsey . 237, 239
— *d.* Winter *v.* Perratt . . 318
— *d.* Wooley *v.* Pickard . . 48

PAGE
Doe *d.* Wright *v.* Plumtree . 405
— *d.* Hutchinson *v.* Prestwidge 364
— *d.* Starling *v.* Prince . . 48
— *d.* Milbourne *v.* Purchasers under Assignees of Simpson . . . 48, 49
— *d.* Jeff *v.* Robinson . . 353
— *d.* Milburn *v.* Salkeld . 48, 49
— *d.* Lumley *v.* Scarborough . 197
— *d.* Shelton *v.* Shelton . . 197
— *d.* Blesard *v.* Simpson . . 308
— *d.* Simpson *v.* Simpson . 308
— *d.* Littledale *v.* Smeddle 87, 312
— *d.* Jersey, Smith *v.* . 58, 68, 125
— *d.* Scruton *v.* Snaith . . 113
— *d.* Wyatt *v.* Stagg . . 20
— *d.* Timmis *v.* Steele . 81, 292, 296, 355
— *d.* Abdy *v.* Stevens . . 121
— *d.* Gaisford *v.* Stone . . 197
— *d.* Whatley *v.* Telling . . 173
— *d.* Courtail *v.* Thomas . . 31
— *d.* Birtwistle *v.* Vardill . 419
— *d.* Watts *v.* Wainwright . 382
— *d.* Rawlings *v.* Walker . 384
— *d.* Bayntun *v.* Watton . . 164
— *d.* Norton *v.* Webster . 126, 139 253
— *d.* Davies and Williams *v.* Williams . . 120, 232
— *d.* Jones *v.* Williams . . 48
— *d.* Devine *v.* Wilson . . 103
— *d.* Hanley *v.* Wood . . 241
— *d.* Daniell *v.* Woodroffe . . 48
— *d.* Foquett *v.* Worsley. . 379
— *d.* Luscombe *v.* Yates . . 178
Doidge *v.* Carpenter . . . 255
— Duke *v.* 431
Doleman, Chadwick *v.* . 435, 438
Dolland, Kensington *v.* . . 347, 348
— Lyster *v.* 396
Dollar *v.* Parkington . . . 169
Doman, Haynes *v.* . 571, 573, 576
Domvile *v.* Winnington. . . 441
Donaldson *v.* Donaldson . . 15
— Rabbeth *v.* . . . 414
Doncaster *v.* Doncaster . . 611
Donnithorpe, Enys *v.* . . . 514
Donoghue *v.* Brooke . . 423, 425
Dorabji Cursetji Shroff, Bombay Burmah Trading Corporation *v.* 178
Doran *v.* Ross . . . 82, 84, 138
Dormer *v.* Packhurst . 47, 77, 83
— Sheldon *v.* 453
— *v.* Smith 157
— *v.* Ward 412
Dorrington, Nelthorpe and Farrington *v.* 29
Dorset (Duke of), Woodcock *v.* 77, 480

PAGE
Dorvell, Tanner *v.* . 378, 448
Doudswell, Baxter *v.* . . 353
Douglas *v.* Congreve . . . 582
— *v.* Lock . . 246, 247
— *v.* Shank . . 163, 164
Doungsworth *v.* Blair . . 229
Dowd *v.* Dowd 621
Dowden and Pook, Ltd. *v.* Pook 571, 577
Dowding, Gregory *v.* . 588, 600
Dowding's Settlement Trusts, *Re*, Gregory *v.* Dowding . 588, 600
Dowley, Allingham *v.* . . . 342
Dowling *v.* Foxall . . . 167
Downs *v.* Hathwait . . . 94
Downshire (Marquis of), Att.-Gen. *v.* 123
Dowse and Sutton's Case . . 281
Dowtie's Case 226
Doyle, Currin *v.* . . 352, 357
Drake *v.* Munday 51
Drakeford *v.* Drakeford . . 444
Drapes, Lamphier *v.* . . . 352
Drax, *Re*, Savile *v.* Drax . . 454
Drew *v.* Norbury (Earl of) 273, 278
— Pugh *v.* 304
Drinkwater, Lane *v.* . . . 518
Druitt *v.* Seaward . . . 404
Drummond, Att.-Gen. *v.* and *v.* Att.-Gen. . . . 141
— *v.* Att.-Gen. for Ireland . . 63, 141
Drury *v.* Army & Navy Auxiliary Co-operative Supply, Ltd. 240
— *v.* Scott 582
— Woodliff *v.* . . . 374, 394
Drury's Case 176
Drybutter *v.* Bartholomew . . 12
Drysdale, Brookes *v.* . . . 483
Dubber *v.* Trollope . . . 310
Dublin & Kingstown Ry. Co. *v.* Bradford . . . 215, 224
Dubowski & Sons *v.* Goldstein 575, 576
Ducane, Howard *v.* 68
Ducie (Earl), Carter *v.* . 433, 439
Duckett *v.* Gordon . . . 490
Duckmanton *v.* Duckmanton . 103
Duckworth, Aspinall *v.* . . . 444
Dudley, Daniel *v.* . . 406, 407
— *v.* Folliott 561
— Smith *v.* 407
Duffield, Cogan *v.* 621
Duguid, Wilson *v.* . . 449, 450
Duke, Angell *v.* 130
— *v.* Doidge 431
— Wheeler *v.* . . 309, 428
Duleep Singh, Robinson *v.* . . 72
Dulwich College, R. *v.* . . 146
Du Moulin, Atcherley *v.* . . 599
PAGE
Dunbar (Corporation) *v.* Roxburghe (Duchess) . . . 148
Duncan *v.* Cannan . 587, 634
Duncomb, Butler *v.* . 77, 461, 463
Dunham, Mills *v.* . . 574, 576
Dunlop, Hamilton (Duke of) *v.* 247
— Locke *v.* . . 419
Dunn *v.* Flood 385
— *v.* Sayles 495
Dunnery, Browne *v.* . . . 113
Dunnill's Trusts, *Re* . . . 621
Dunsterville, Ball *v.* . . . 7
Duntze, Terry *v.* . . . 527
Durant, James *v.* 594
— Spencer *v.* . . . 517
Durchin *v.* Vaghan . . . 95
Durell, Noble *v.* . . . 66
Durham and Sunderland Rly. Co. *v.* Walker . . 242, 245, 247
Dutch West India Co. *v.* Van Moses 179
Dutton *v.* Taylor . . 262, 265
Dwyer *v.* Rich 234
Dyas, Ward *v.* 377
Dyche, Fletcher *v.* . . . 506
Dyer *v.* Awister 53
— Dawson *v.* . . . 540
— *v.* Green 225
— Price *v.* 103
Dymock, Younge *v.* . . . 363
Dyne *v.* Nutley 216
Dyster, Barrow *v.* 136

E.

Eagleton *v.* Gutteridge . . 34
Eales *v.* Conn 27, 128
Eardley, Childers *v.* . . 190, 581
Earle, Wing *v.* 66
Early *v.* Rathbone . 219, 230, 232
Earsfield, Shelley *v.* . . 312, 339
Easterby, Sampson *v.* . 198, 490
Eastern Counties Ry. Co., Grafton *v.* 532
— *v.* Philipson 538
East India Co., Hotham *v.* . . 523
Eastland, Peacock *v.* . . 20, 364
East London Waterworks Co. *v.* Trustees for Mile End Old Town 231
East Wonford (Hundred of), Pellew *v.* 167
Eaton *v.* Lyon 501
Ebden, Vinkeston *v.* . . . 224
Eccles, Caister *v.* 497
Ecclesiastical Commissioners *v.* Wodehouse 304
Ecclestone *v.* Clipsham . . 516

PAGE
Ecroyd *v.* Coulthard . . . 235
Edbrooke, Boyce *v.* 511
Eden, South Metropolitan Cemetery Co. *v.* 244
Edge *v.* Boileau 540
— Clarkson *v.* 504
Edgington, *Re* 447
— Morris *v.* . 253, 556
Edgware, &c. Ry. Co., Johnson *v.* 118, 230
Edmonds *v.* Edmonds, Flower, *Re* 386
Edmunds *v.* Edmunds . . . 20
Edmundson *v.* Render . . 578
Edward Seymour's Case . 307, 354
Edwards, *Re* 590
— *v.* Alliston . . . 380
— *v.* Applebee . . . 566
— *v.* Bailey . . . 47, 49
— Blodwell *v.* 420
— *v.* Broughton . . . 581
— *v.* Brown . . . 197
— *v.* Fashion 396
— Frank *v.* 191
— Green *v.* 52
— King *v.* 79
— Lyall *v.* 193
— *v.* Marcus . . 79, 80
— Perry *v.* 560
— Phillips *v.* . . 14, 18
— Searville *v.* 50
— & Denton's Case . . 231
Edye *v.* Addison 601
Eedes, Knotsford *v.* 49
Eeles *v.* Lambert 283
Egerton *v.* Brownlow (Earl) . 610
Egremont, Northumberland *v.* 76, 436
Ehrman *v.* Bartholomew . 576, 577
Ekins, Green *v.* 614
Elderton, Emmens *v.* 487
Elice (or Elie) *v.* Osborne 323, 375
Ellen *v.* Topp 536
Ellesdon, Trethewy *v.* 86
Ellesmere Brewery Co. *v.* Cooper 33, 39
Ellicombe *v.* Gompertz . . . 385
Ellicott, Lindsay *v.* 409
Elliot, Bishop *v.* 230
— *v.* Davis 5, 7, 19
— *v.* North Eastern Ry. Co., and N. E. Ry. Co. *v.* 258, 259, 268, 269
Elliott *v.* Royal Exchange Assurance Co. 533
Ellis, Barrymore *v.* 351
— Frail *v.* 203
— Reynolds *v.* . . . 605, 635
— St. Albans *v.* 486
Ellison *v.* Bignold 485
— *v.* Thomas . 433, 434, 435
Ells *v.* Clark 94
Elmsley *v.* Young . . 398, 402

PAGE
Elphinstone (Lord) *v.* Monkland Iron and Coal Co. 506
Else *v.* Osborn 323, 375
Elton *v.* Elton, No. 2 626
Elves *v.* Crofts 572
Elwes, Iven (or Ivens) *v.* 198, 199, 491, 493
Ely (Bishop of), North (Lord) *v.* 108, 228
Emery, Chapman *v.* 202
— James *v.* . . 516, 519
Emmens *v.* Elderton 487
Emmins *v.* Bradford . 415, 416
Emperor *v.* Rolfe . 461, 462, 474, 476, 477
Empsey, Zouch *v.* 169
Empson's Case 196
Englefield, Lucy *v.* 49
Enthoven *v.* Hoyle . . 30, 36
Enys *v.* Donnithorpe 514
Erington, Read *v.* 319
Ernest, Hopgood *v.* 79
Errington, Bathurst *v.* 429
— Northumberland (Duke of) *v.* . . . 547
— Rorke *v.* . 220, 226
Errissey, West *v.* 381, 616, 619, 629
Erskine *v.* Adeane . . 129, 130
Esdaile *v.* Assessment Committee of City of London Union . . 148
Espley *v.* Wilkes 240
Essery *v.* Cowlard 411
Essex, Tisdale *v.* . . . 51, 561
Este *v.* Smyth 634
Estoft's Case 303
Ethel and Mitchell & Butler's Contract, *Re* . . . 89, 301
Evans *v.* Bremridge 19
— *v.* Crocker 164
— *v.* Evans 329
— Field *v.* 350
— *v.* Grey 12, 21
— Jeffryes *v.* 561
— *v.* King 177
— Leadley *v.* 191
— *v.* Pratt 72
— Robinson *v.* 409
— *v.* Scott 460, 462
— Siggers *v.* 15, 19
— Texira *v.* 35
— Turner *v.* 572
— *v.* Vaughan . 45, 557, 562
— Wickens *v.* 572
Evelyn *v.* Evelyn 453, 456, 457, 458
Evers *v.* Strickland 180
Ewart *v.* Cochrane . 256, 257, 261
— *v.* Ewart 588
Ewelme Hospital, Att.-Gen. *v.* . 123, 145
Ewer, White *v.* 561
Ewing *v.* Ewing 93

PAGE
Exchange Bank of Yarmouth *v.* Blethen 21
Exel *v.* Wallace 340
Exeter (Bishop of), Gorham *v.* . 142
Exton *v.* Scott 15
Eyre, Boone *v.* . 486, 535, 540
— Bradshaw *v.* 254
— *v.* Monro 607
Eyres, Swyft *v.* 222, 384

F.

Faber, Bateman (Lady) *v.* . . . 197
Fain *v.* Ayres 567
Fairbanks, Reid *v.* 295
Fairlie *v.* Christie 32
Fairmaner, Webb *v.* 167
Falkingham and Sons, National Bank of Australasia *v.* . . . 126
Fallon, *Ex parte* 166
Falmouth (Earl) *v.* Roberts . . 31
Fancy *v.* Scott 246
Fanshaw's Case 179
Farewell *v.* Coker 193
Farley, Croydon Hospital *v.* . . 179
Farmer, Att.-Gen. *v.* 123
— Farrowes *v.* 79
— *v.* Howe 232
Farmor, Whites *v.* 223
Farnell's Settled Estates, *Re* . 53, 199
Farquhar, *Ex parte*, Starkey, *Re* 169
Farrall *v.* Hilditch . . 198, 490
Farren, Kemble *v.* . . . 505, 507
Farrer *v.* Barker 465
Farrington, Deering, *v.* 497
Farrowes *v.* Farmer 79
Fashion, Edwards *v.* 396
Fauconberge, Fitzgerald *v.* . . 26
Faulkner *v.* Lowe 511
Faulkner, Morse *v.* . . . 568, 580
Fauntleroy, R. *v.* 3
Fausset *v.* Carpenter 273, 276, 277, 278
Faustenditch, Cross *v.* . . . 206
Fazakerly *v.* M'Knight . . . 33
Fearnley, London Guarantie Co. *v.* . . 524, 526, 529
Fearnside, Warren *v.* 164
Fearon *v.* Aylesford (Earl of) . 538
Featherston *v.* Hutchinson . 200
Fellowes, Berens *v.* 317
— Caldwell *v.* . 586, 589, 606
Fellows, Jermyn *v.* 438
Fendall *v.* Goldsmid 178
Fennell, Waterpark *v.* . 143, 145, 146
Fennick and Mitford's Case . 319
Fenton *v.* Fenton 91
Fenwick *v.* Greenwell 450
— *v.* Mitforth 319

PAGE
Fenwick *v.* Schmalz 231
— Winn *v.* 451
Fenwike, Milford *v.* 319
Ferguson, Sainter *v.* . 505, 506, 507, 572
Fermor, Ferrers *v.* 79
Fern, Francklyn *v.* 128
Ferne's (Dean and Chapter of) Case 9, 10
Ferrars *v.* Cherry 203
Ferrers *v.* Fermor 79
Fesch (Abbot of), Veners v. . 289
Fetherstone, Westby *v.* . 310, 312
Fettiplace, Denton *v.* . . . 49
Feversham *v.* Watson 531
Field, Beaumont *v.* 110
— *v.* Evans 350
— Fitzgerald *v.* 479
— Hodgson *v.* . . . 115, 246
— *v.* Hopkins 188
— *v.* Lelean 136
Fielden, Oliver *v.* . . . 532, 533
Fielder *v.* Tovy 95
Filmer *v.* Gott 204
Finch *v.* G. W. Ry. 244
Finch *v.* Tucker 357
Finch's (Sir Moyle) Case . 180, 419
Fincher, Butler *v.* . . . 164, 179
Finchley Electric Light Co. *v.* Finchley Urban District Council 236
Finchley Urban District Council, Finchley Electric Light Co., *v.* 236
Finlay *v.* Darling . . 587, 588, 600
Firbank, Fitzgerald *v.* . . . 241
Fisher, G. W. Ry. *v.* 563
— Holland *v.* 123
— Morrell *v.* . . . 213, 215
— *v.* Shirley 591
— *v.* Smith 203
— Thompson *v.* 614
— Tyler *v.* . . . 289, 445
— *v.* Wicks (Wigg or Wiggs) 77, 397
Fishmongers' Co., Att.-Gen. *v.* . 145
Fisk, Canham *v.* 258
Fitzgerald, *Re*, Surman *v.* Fitzgerald . 345, 633, 634
— Agricultural Cattle Insurance Co. *v.* 30, 31
— Barton *v.* . 76, 121, 501, 552
— Dawson *v.* . . . 533, 534
— *v.* Fauconberge . . 26
— *v.* Field 479
— *v.* Firbank 241
— Reilly *v.* . 464, 467, 478
— Roddy *v.* . 64, 67, 121
— Surman *v.* 345, 633, 634
Fitzgerald's Settled Estates, *Re*, Saunders *v.* Boyd . 435, 437

PAGE
Fitzgibbon, Pike *v.* . . . 349
Fitzherbert *v.* Heathcote . 392, 426, 427
Fitzhugh *v.* Dennington . . 160
Fitzhughes' Case 95
Fitzmaurice, Brennan *v.* . . 618
Fitzmaurice, Rochfort *v.* . 91, 316, 427, 428, 610, 611, 612, 613, 615
Fleet *v.* Murton 136
Fleetwood, Lindow *v.* . 626, 628
Fleming *v.* Fleming . . . 397
Fleshees (or Flessier), Palmer *v.* 257, 268
Fletcher, Croockewit *v.* . . 32, 532
— *v.* Dyche . . . 506
— *v.* Fletcher (4 Hare 67). 15
— *v.* Fletcher (9 L. R. Ir. 301) . . 444, 447
— Hurd *v.* . . . 79, 562
— Makepiece, *v.* . 309, 428
— Palmer *v.* . . 257, 268
Flinn *v.* Calow 126
Flint *v.* Brandon 27
Flintoff, Horner *v.* . . . 507
Flood, Dunn *v.* 385
Flower, *Re* Edmonds *v.* Edmonds 386
Flower, Harris *v.* 244
Floyer *v.* Bankes . . . 385
Flynn, Nash *v.* 16
Foley *v.* Addenbrooke . . 518
— Moore *v.* . . 148, 501
Folliott, Dudley *v.* . . . 561
Fonnereau *v.* Fonnereau . . 325
Foord *v.* Wilson . . 544, 551
Foot, Ruby *v.* 457
Foote *v.* Berkly . . . 193, 194
Foquett *v.* Worsley . . . 379
Forbes, *Re* 415
— Bottomley *v.* . . . 134
— Solly *v.* . . 47, 77
— Stannard *v.* . 500, 551
Ford, Badger *v.* 254
— *v.* Metropolitan Ry. Co. . 261
— *v.* Stuart 79
— *v.* Yates 136
Ford and Hill, *Re* . . . 68
Forrest, Fowell *v.* . . . 192
Forreyner, Turpine *v.* . . . 231
Forshaw *v.* Chabert . . . 32
Forster, *Re* 459
— *v.* Davies . . . 588
— *v.* Forster 358
— Negus *v.* 414
Fort *v.* Ward 254
Fortescue *v.* Hennah . . . 607
Forwood, Rhodes *v.* . . . 497
Foster, Browne *v.* . . . 304
— *v.* Foster . . . 204, 362
— Halton *v.* . . . 400
— *v.* Mackinnon . . . 5
— *v.* Mapes . . . 562

PAGE
Foster, Mitchell *v.* . . . 169
— Norman *v.* . . 548, 552
— Willoughby *v.* . . . 220
— and Lister, *Re* . . . 204
Fothergill *v.* Walton . . . 539
Foulkes, Tupper *v.* . 5, 8, 11, 12
Founds, Cooke *v.* 542
Fowell *v.* Forrest . . . 192
Fowkes *v.* Manchester and London Life Assurance and Loan Association . . . 108
Fowle *v.* Welsh . . . 501, 562
Fowler *v.* Hunter 79
Fowns, Cookes *v.* . . . 542
Fox *v.* Hawks 347
— Markham *v.* . . . 33
— *v.* Scard 504
— Stork *v.* 223
Fox *v.* Wright 4
Fox's Case . . . 50, 359, 360
Foxall, Dowling *v.* . . . 167
Foxwell, Van Grutten *v.* . . 324
Frail *v.* Ellis 203
Frain, Dillam *v.* . . . 313
Fraine, Dillon *v.* . . . 313
Frame, Merrill *v.* . 117, 500, 552
France *v.* Clark . . . 35, 36
Francis *v.* Hayward . . . 221
— *v.* Minton . . 232, 275
Francklyn *v.* Fern . . . 128
Franco, Torres *v.* . . . 481
Frank *v.* Edwards . . . 191
— Marshall *v.* . . 52, 232
Frankland *v.* Nicholson . . 177
Franklin, Clarke *v.* . . . 376
— Cotterel *v.* . . . 224
— Hood *v.* . . 602, 603
Franklin's Case . . . 363
Franklin and Waller (or Walter), Cooper *v.* 363
Frankline, Cowper *v.* . . 363
Frankling, Cooper *v.* . . . 363
Franks *v.* Price 611
Franlin, Carier *v.* . . . 363
Fraser *v.* Pendlebury . . . 196
— *v.* Skey 499
Frasier, Kidd *v.* 400
Frearson, Howton *v.* . 263, 265
Frecker, Norton *v.* . . 357, 358
Frederick *v.* Frederick . . . 446
Freeman, Barker *v.* . . . 84
— *v.* Read . . 159, 169
— *d.* Vernon *v.* West . 164
Freestone, Godbold *v.* . 319, 320, 375
— Wallis *v.* . . . 387
French *v.* Hope 208
— *v.* Macale . . 504, 505
— *v.* Patton . . 33, 34, 37
— Robertson . . 27, 57
Freshfield *v.* Reed . . . 21
Freswell, Barfoot *v.* . . . 489

PAGE
Frew, Simpson *v.* . . 434, 441, 451
Friar, Grey *v.* 539
Frogmorton *d.* Robinson *v.* Wharrey 323
Frosett *v.* Walshe 18
Frost, *Re*, Frost *v.* Frost . . 387
— Jones *v.* 197
— Stephens *v.* . . 468, 473
Frowd's Settlement, *Re* . . 589
Fry *v.* Capper 386
— *v.* Sherborne (Lord) 475, 477, 479
Frye, Adams *v.* 41
Fryer, Sowerby *v.* 304
Fulcher, Hayward *v.* . . . 9, 10
Fuller, Cooke *v.* 413
— *v.* Woodhouse 102
Furley *d.* Canterbury (Mayor) *v.* Wood 153
Furness, Baumvoll Manufactur von Scheibler *v.* 86
Furness *v.* Meek . . 16, 18
Furnivall *v.* Coombes . . 85, 501
Fursaker *v.* Robinson . . 568
Futter, Woodhouse *v.* . . . 102
Fyfe *v.* Arbuthnot . . 588, 602

G.

Gabay *v.* Lloyd 137
Gabb *v.* Prendergast 314, 418, 419
Gaffee, *Re* 349, 352
Gainsford *v.* Griffith 121, 505, 544, 552
Gaisford *v.* Stone 197
Gale *v.* Gale 607
— Lang *v.* . . . 62, 78, 157
— *v.* Reed 571
— *v.* Williamson . . 79, 203
Gallagher, Macandrew *v.* . . . 49
Galland, Pinnington *v.* 262, 263, 265
Galley *v.* Barrington . 87, 91, 316
Galloway, Smith *v.* . 215, 222, 226
Galsworthy *v.* Strutt . . . 506
Gamel, Crisp *v.* 201
Games, Davies *v.* 396
Gamlingay (Inhabitants of), R. *v.* 172, 173
Gandy, Robinson *v.* 594
Gape *v.* Handley 147
Garde *v.* Garde 303
Gardiner, Hawkins *v.* 208
— Knotsford *v.* 231
Gardner *v.* Lachlan 24
— *v.* Sheldon 373
— *v.* Walsh 38
Gare, Pollard *v.* 269, 270
Garford, Bayly *v.* 42
Garland *v.* Beverley 318
— Lester *v.* . 166, 344, 345
Garnett, *Re*, Robinson *v.* Gandy . 594
Garnish *v.* Wentworth . . 205
Garnons *v.* Knight 13
Garrett *v.* Lister 21
Garret, Wigson *v.* 54, 79
Garth *v.* Baldwin 335
— Phillips *v.* 399
Gartham, Withnell *v.* . . 145, 146
Gartside *v.* Silkstone and Dodworth Coal and Iron Co. . 10, 79
Gassiot, Ivison *v.* 231
Gaston, Wilkinson *v.* 165
Gatacre, Vernon *v.* 86
Gataker *v.* Reynardson 582
Gatchel, Hawksland *v.* . . . 17
Gatcombe, Chapman *v.* 278
Gatliff, Bourne *v.* 62
Gawler *v.* Standerwick 461
Gawtry (Hundred of), Norris *v.* . 166
Gayford *v.* Moffatt 266
— Plowden *v.* 406
Gayler, Howell *v.* 407
Geary, Baines *v.* . . 574, 576, 577
Geddes, Havelock *v.* 539
General Accident Assurance Corporation *v.* Noel 507
General Finance, &c., Co. *v.* Liberator Society . . 195, 198
General Privileged Dutch Co. trading to West Indies, Henriques *v.* 179
Genney, Paston *v.* 98, 99
Gennings *v.* Lake 253
George, Agar *v.* . . . 589, 602
Gerard, *Re*, Oliphant *v.* Gerard 588, 603
— *v.* Lewis 498
Germain *v.* Orchard 295
German *v.* Risley . . . 205, 206
Gerrard, Cook *v.* 378
— Grugeon *v.* . . . 14, 15, 17
— *v.* O'Reilly 505
— Warwick *v.* 206
Gerrarde *v.* Worseley 205
Gerry *v.* Davis 95
Gervis *v.* Peade 543
Gething, Mumford *v.* . . . 72, 573
Gibb, National Society for Distribution of Electricity, &c. *v.* . 514
Gibbon *v.* Mendez 532
Gibbons, Owen *v.* 317
— *v.* Vouillon 510
Gibbs, Dodwell *v.* . 282, 285, 295
Giblett, Coare *v.* 18
Gibney, Adams *v.* 499
Gibson *v.* Barton 155
— *v.* Clark 223
— *v.* Gibson, Coley, *Re* . 417
— *v.* Goldsmid 537
— Gresty *v.* 179
— Lake *v.* . . . 396, 397
— *v.* Small 131
— *v.* Way, Currey, *Re* . . 605

PAGE
Gier *v.* Ossiter 53
Gilbert, Ivy *v.* 453
Gilbertson *v.* Richards . 361, 367
Gilby *v.* Copley 23
Gilchrist & Co., Baumvoll Manufactur von Scheibler *v.* . . 86
Giles *v.* Hooper 486
— *v.* Melsom 65
— Walker *v.* 82
Gilham, Naldred *v.* 14
Gill, Hext *v.* 64, 77
Gillett *v.* Abbott . . . 199
Gillot, Trickett *v.* 313, 314
Gilmore *v.* Harris . . 311, 315
Gilmour, Caledonian Insurance Co. *v.* 533
Gimlet, *Re* 178
Gimson, Worthington *v.* . 252, 260
Girland *v.* Sharp . . . 366
Glaholm *v.* Hays 532
Glassington *v.* Rawlins . . 169
Glave *v.* Harding 258
Glazebrook *v.* Woodrow . . 530
Glengall, Clayton *v.* . . . 45
Glenister, Skull *v.* . . . 244
Glenorchy (Lord) *v.* Bosville . . 613
Glyn, *Ex parte* 183
Glynn *v.* Margetson . . . 86
Goblet *v.* Beechey . . . 59
Godbold *v.* Freestone . 319, 320, 375
Goddard's Case . 2, 6, 8, 21, 173, 175
Godsell, Harper *v.* 230
Godson *v.* Sanctuary . . . 169
Godwin *v.* Schweppes, Ltd. 269, 270
— Spencer *v.* 93
Gold Coast and Ashanti Explorers, Ltd., Smith *v.* . . 169
Goldshede *v.* Swan . . 62, 64
Goldsmid, Fendall *v.* . . . 178
— Gibson *v.* 537
Goldsmiths' Co. *v.* West Metropolitan Ry. 166, 168
Goldstein, Dubowski & Sons *v.* 575, 576
Goldwire, Legg *v.* 629
Gomm, L. & S. W. Ry. *v.* . 385, 386, 390
Gomme, Allan *v.* 244
Gompertz, Ellicombe *v.* . . . 385
Gonaston, Markham *v.* . . . 33
Gonsales, Bond *v.* 134
Good *v.* Ash 10
Goodenongh, R. *v.* . . . 169
Goodgaine *v.* Wakefield . . 164
Goodiar *v.* Clarke 337
Goodier *v.* Clerke . . . 337
Goodisson *v.* Nunn . . . 530
Goodman, Cooch *v.* 7
— Dafforne *v.* . . 336, 416
— Richardson *v.* . . . 472
— *v.* Saltash (Mayor) . 390

PAGE
Goodman's Trust, *re* . . . 419
Goodright *d.* Goodridge *v.* Goodridge 339
— *v.* Gregory . . . 12
— *v.* Moses 204
— *d.* Burton *v.* Rigby . 315
— *d.* Carter *v.* Straphan 12, 37
Goodtitle *d.* Edwards *v.* Bailey . 47, 49
— *d.* Weston *v.* Burtenshaw . . 84, 322
— *d.* Dodwell *v.* Gibbs . 282, 285, 295
— *v.* Pettoe 206
— *d.* Hood *v.* Stokes . 397
Goodwin *v.* Clark . . . 337
— Turner *v.* 530
Goole, Langdon *v.* 92
Gord *v.* Needs 106
Gordon, Duckett *v.* . . . 490
— *v.* Hope 481
— *v.* Levi . . . 447, 449
— *v.* Morley 134
— *v.* Raynes . 463, 465, 479
— Storer *v.* . . 24, 532, 539
— *v.* Whieldon . . . 395
Gorham *v.* Exeter (Bishop of) . 142
Goring, Holmes *v.* . 263, 264
Gorman *v.* Willis . . . 10
Gorrissen *v.* Perrin . . . 72
Gorst *v.* Lowndes . . . 165
Gorton's Case 20
Goshawke *v.* Chickell or Chiggell 87, 294, 295
Gosnold, Sheppard *v.* . 141, 148
Goss *v.* Nelson 464
— *v.* Nugent (Lord) . . 125
Gossage *v.* Tayler 323
Gott, Filmer *v.* 204
Gotyer, Leigh *v.* 561
Gould *v.* Barnes . . 178, 179
— *v.* Gould 615
— Sampayo *v.* . . 627, 628
— Shrewsbury *v.* . . 494, 501
Gowan, *Re*, Gowan *v.* Gowan . 621, 622
Gower *v.* Cunningham . . 320
— *v.* Grosvenor . . . 620
Grabham, Bates *v.* . . . 34
Grafftey *v.* Humpage . 406, 407, 594, 596
Grafton *v.* Eastern Counties Ry. Co. 532
— (Duke of) *v.* Hanmer . 357, 358
Graham, Cochran *v.* . . . 607
— *v.* Graham . . . 18
— Hamilton (Duke of) *v.* . 247
— Pearce *v.* 591
— *v.* Wickham . . . 607
— Windham *v.* 439

PAGE
Granew v. Parker 405
Grange, Hill v. . 76, 90, 252, 253
Grant v. Maddox . 62, 72, 137
— Wynch v. 488
Granville, Blythe v. 598
— Worsley v. 463
Grattan v. Langdale 275
Gravely v. Barnard . 504, 573
Graves v. Hicks 454
— Horner v. 577
— v. Legg . 523, 535, 536, 539
— v. White 489
Gravesend and Milton Waterworks Co., Knight v. 494
Gray, Hinde v. 576, 577
— v. Limerick (Earl) . 188, 434, 435
— Lisle v. 327
— Watson v. 240
Gray's Settlement, *Re*, Akers v. Sears 400
G. E. Ry. Co., United Land Co. v. 244
Great Indian Peninsula Ry. Co., Tayler v. 36
Great Northern Ry. v. Harrison 494
— Co., Salisbury (Marquis) v. 234, 239
Great Torrington Commons Conservators v. Moore Stevens . 235, 236
Great Wakering, R. v. 515
Great Western Ry. Co., Bayley v. 258, 260
— Finch v. . 244
— v. Fisher . . 563
— Rigby v. . 487
— v. Talbot . 244
Greaves' Settled Estates, *Re*, Jones v. Greaves 463
Green, Bartlett v. 335
— v. Belcher 452
— Boraston v. 133
— Bridgman, v. 204
— Dyer v. 225
— v. Edwards 52
— v. Ekins 614
— v. Green 50, 431
— Haslewood v. 318
— Isaacs v. 179
— Jenkins v. 103
— Kennedy v. 209
— d. Crew v. King . . . 395
— Kirby v. 156
— v. Paterson . . 606, 607
— v. Price, and Price v. . 506, 572, 575
— Prince v. 206
— v. Proctor 52
— Spoor v. 549
— v. Wilcocks 170

PAGE
Green, Williams v. 17
Green's Case 123
Greenhill, Strange v. 95
— Tringham, *Re* . . 332
Greenshields, Barnhart v. . . 209
Greenslade v. Dare 209
Greenway, Wilkes v. 263
Greenwell, Fenwick v. 450
Greenwood v. Tyber (or Tyler) . 289
— Wilson v. 344
— Woodroff v. . . . 501
Gregg v. Holland, Holland, *Re* 202
— v. J. S. 95
Gregory, Coward v. 539
— v. Dowding, Dowding's Settlement Trusts, *Re* . . . 588, 600
— Goodright v. 12
Gregson, Clayton v. . . . 59, 72
Greneley's Case 614
Grenelife (Executors of) v. W. . 559
Gresty v. Gibson 179
Greswold's Case 323
Gretton, Ludford v. 173
Grey, Evans v. 12, 21
— v. Friar 539
— v. Mannock 358
— v. Pearson . 43, 46, 63, 121
— Pickersgill v. 357
— v. Stuart 582
— and Edward's Case . . . 50
Grier v. Grier 616, 628
Grieveson v. Kirsopp 275
Griffin v. Clowes 18
Griffith v. Buckle 616
— Gainsford v. . 121, 505, 544, 552
— Morgan v. 130
Griffith's Policy, *Re* 623
Griffiths v. Penson . . 108, 217, 224
Griffits, Noden v. 320
Grimesby (Prior of) v. B. . . 445
Grimsdale, Cromwell v. 5, 95, 175
Grimwade, Lound v. . . . 200
Grose v. West 239
Grosvenor, Gower v. 620
Grote, Ibbetson v. 590
Grove, *Re*, Vaucher v. Treasury Solicitor 419
— Watt v. 204
Grover, Tidmarsh v. 38
Grubb, Barkshire v. . 260, 261
Grubbam, Stone v. 173
Grubham's Case 289
Grugeon v. Gerrard . 14, 15, 17
Grumsdale (or Grumsden), Cromwell v. 5, 95, 175
Grunsdale, Crumwell v. . 5, 95, 175
Grunsden, Cromwell v. . 5, 95, 175
Grymes v. Peacock . 252, 254

PAGE
Gudgen *v.* Besset 17
Guepratte *v.* Young 635
Guibert, Lloyd *v.* 632
Guildford, De Lassalle *v.* . . . 130
Gulson, Miller *v.* 622
Gundry, *Re*, Mills *v.* Mills . . 511
Gunter, Darrell *v.* 55
Gurnell, Clarke *v.* 532
Gutteridge, Eagleton *v.* . . . 34
Guy *v.* Brown 253
— Bunn *v.* 571
Guy's Hospital, Baynham *v.* 147, 501
Gwyn *v.* Neath Canal Navigation Co. . . . 82, 85, 186, 187
Gwynne, Davidson *v.* 539
Gye, Bettini *v.* 537
Gyles, Woodward *v.* 505

H.

H. *v.* W. 343
Haddon *v.* Ayers 520
Haden, *Re*, Coling *v.* Haden . 583
Hagarty *v.* Nally 294
Haggerston *v.* Hanbury . 49, 54
Hake, King *v.* 481
Hakewill, Thompson *v.* . . . 518
Halfpenny, Uvedale *v.* 90
Hales *v.* Petit 394
— *v.* Risley 391, 392
Haliwel *v.* Courtney 106
Hall *v.* Benson 153
— Bramhall *v.* 53
— Brunton *v.* 245
— *v.* Byron 254
— *v.* Cazenove 175
— *v.* Chandless 34
— *v.* City of London Brewery 499, 561
— *v.* Combes 215
— *v.* Hurt 454
— *v.* Janson 134
— *v.* Peart 215
— *v.* Seabright 52
— Walker *v.* 47
— Wheate *v.* 625, 626
— *v.* Winckfeild 22
Hallett, Doe *v.* 418
— James *v.* 314
— *v.* Middleton 567
Halsall, Cowie *v.* 38
Halsey's Case 172
Halton *v.* Foster 400
Hambro *v.* Hambro 454
Hames *v.* Hames 407
Hamilton *v.* Att.-Gen. . . . 145
— *v.* Baker 148
— (Duke of) *v.* Dunlop . 247
— — *v.* Graham . 247
— *v.* James 594

PAGE
Hamilton, Kendall *v.* . 514, 515
— *v.* Mills 332
— Nixon *v.* 201
Hamlyn *v.* Talisker Distillery . 633
— *v.* Wood . . 493, 497
Hammersly, *Re* 301
Hammond *v.* Barrett 344
— *v.* Brewer 172
— *v.* Hammond 184, 582, 585
— *v.* Hill 558
— Langley *v.* 260, 261, 268
Hamond *v.* Dod 561
— *v.* Jethro 396
Hampson *v.* Brandwood . 426, 619
Hanbury, Davenport *v.* . 422, 428
— Haggerston *v.* . 49, 54
— *v.* Jenkins 251
— *v.* Tyrell . . 85, 89
Hancock, *Re*, Malcolm *v.* Burford-Hancock . . 412
— *v.* Hancock . . 346, 604
Handley, Gape *v.* 147
Hankey, D'Estampes *v.* . . . 586
Hankinson, Sharplus *v.* . . . 83
Hanley *v.* Wood 241
Hanmer, Grafton (Duke of) *v.* . 357, 358
Hanning, Boyce *v.* 387
Hansaker, Kirby *v.* 561
Hanson, Henn *v.* 193
Hanway, Clarkson *v.* 204
Harding, *Ex parte* 19, 514
— *v.* Ambler 207
— Glave *v.* 258
— *v.* Wilson 240
Hardinge *v.* Cobden, Lucan, *Re* . 508
Hardisty, Wood *v.* 488
Hardman *v.* Maffett 416
Hardwicke *v.* Wilmot, De Ros' Trusts, *Re* 583, 586
Hardy, Berkeley *v.* 24
— Buckler *v.* 282
— Cowlishaw *v.* . . . 53, 127
— *v.* Martin . . . 504, 506
— *v.* Ryle 167
Hare, Havergall (Havergil or Havergill) *v.* . . . 78, 79
— Haynes *v.* . . . 125, 127
— *v.* Horton 18, 116
— *v.* Shearwood 127
Haren, Brew *v.* 145
Harewood (Lord), Milner *v.* . . 606
Harker *v.* Birkbeck 241
Harlock, Legg *v.* 505
Harman *v.* Richards . 79, 129, 203
— and Uxbridge and Rickmansworth Ry. Co., *Re* . . 199
Harms *v.* Parsons 573
Harnett *v.* Macdougall . . . 351
Harper *v.* Bird 486
— *v.* Burgh 486

PAGE
Harper *v.* Godsell 230
Harpur's Case 206
Harrington *v.* Harrington . . 620
— *v.* Lawrence . . 423
— *v.* Wise 51
— *v.* Wyes 51
Harris, Attwell *v.* 203
— *v.* Boots Cash Chemists, Ltd. 511
— Cowie *v.* 169
— *v.* Flower 244
— Gilmore *v.* . . . 311, 315
— *v.* Loftus 425
— Mander *v.* 395
— *v.* Tubb 204
— Tucker *v.* 475
— Walker *v.* 527
Harrison *v.* Austin 48
— *v.* Barton 396
— *v.* Blackburn 229, 230, 232
— *v.* Davis, Davies, *Re* . 603
— G. N. Ry. *v.* 494
— *v.* Harrison 324
— *v.* Jackson 7
— *v.* Muncaster 555
— *v.* Naylor 615
— Newby *v.* 241
— Pelton Bros. *v.* . . . 345
— Richardson *v.* 327
— Rooper *v.* 277
— *v.* Symons 423
— *v.* Wright 507
Harrow (Inhabitants), R. *v.* . . 172
Harrowby, Townshend *v.* 585, 588, 601
Harslet *v.* Butcher 547
Hart *v.* Hart 64
— *v.* Middlehurst 616
— *v.* Middleton 158
— *v.* Porthgain Harbour Co., Ltd. 510
— *v.* Windsor 499
Hartley, Att.-Gen. *v.* 146
Harvey *v.* Ashley 630
— *v.* Aston 465
— Bosnall *v.* 325
Harwich (Mayor, &c., of), Smith *v.* 493, 496
Harwood, Isaacson *v.* . . 488, 491
Haslewood *v.* Green 318
Hasluck, *Ex parte*, North, *Re* 167, 168
Hassell *v.* Long 191
Hastings Corporation *v.* Ivall . 143
— N. E. Ry. Co. *v.* 39, 148
Hasting's (Lady) Case . . 53
Hathaway, Williams *v.* . . 85, 501
Haths *v.* Ash 164
Hathwait, Downs *v.* 94
Hatter *v.* Ashe 164
Hatton's (Sir Christopher) Case . 205
Haukinson *v.* Sandilands . . 513
Havelock *v.* Geddes 539

PAGE
Havergall (Havergill or Havergil) *v.* Hare 78, 79
Hawes *v.* Hawes . . 318, 397
Hawker, Wickham *v.* . . . 247
Hawkes *v.* Hubback 349
— Stronge *v.* 276
Hawkey, Tippet *v.* 519
Hawkins, Chesterfield Colliery Co. *v.* 24
— *v.* Gardiner 208
— *v.* Hawkins 376
— Jocelyn *v.* 158
— *v.* Kemp 22
— Matts *v.* 240
Hawks, Fox *v.* 347
Hawksland *v.* Gatchel 17
Haydon, Macintosh *v.* . . . 38
— *v.* Wilshere 422
Hayes *v.* Bickerstaffe . . 540, 560
— Stanley *v.* 563
Hayley, Bamford *v.* 87
Haymes, Brooke *v.* 196
Hayne, Clarke *v.* . . 403, 404
— *v* Cummings . . 46, 483
Haynes *v.* Doman . 571, 573, 576
— *v.* Hare . . 125, 127
— *v.* Holliday 136
— *v.* King 237
Hays *v.* Bickerstaffe . . 540, 560
— Glaholm *v.* 532
Hayton *v.* Irwin 135
Hayward, Francis *v.* 221
— *v.* Fulcher 9, 10
— Remon *v.* 65
— *v.* Young 571
Haywood, Nichols *v.* 41
Hazel, Dacres (Lady) *v.* . . . 206
Hazeldine, Ray *v.* . . 256, 264
Heal, Wootton *v.* 561
Healy *v.* Thorne 145
Heard *v.* Wadham 531
Hearing, Style *v.* 499
Heartley *v.* Nicholson . . . 54
Heath, Butterfield *v.* 204
— Clerke *v.* 41
— *v.* Crealock 195
— Prin *v.* 41
Heath's Settlement, *Re* . 425, 480
Heathcote, Cochin *v.* . . . 9, 290
— Fitzherbert *v.* 392, 426, 427
— Sutherland (Duke of) *v.* 241, 247
Heaton *v.* Beachey, Beachey, *Re.* 232
Heavens, Jones *v.* 504
Heaver, Lowther *v.* 52
Hebblethwaite *v.* Cartwright 314, 418
Hector, Colliss *v.* 634
Hedgecock, Baker *v.* 502, 575, 576
Hedley *v.* Joans 173
Heelis *v.* Blain 68

PAGE
Hele, Wotton *v.* . . . 561
Helliar or Hellior, Lewis *v.* . . . 556
Hellier *v.* Casbard . . . 486
Helyar, Coryton *v.* . . . 76
Hemans *v.* Picciotto . . . 543
Heming, Cherry *v.* . . . 5
Hemmings, Attoe *v.* . . . 90
Henderson, Dendy *v.* . . . 573
Heneage, Barlow *v.* . . 14, 15
Henfree *v.* Bromley . . 37, 42
Henley, Clement *v.* . . . 24
Henn *v.* Hanson 193
Hennah, Fortescue *v.* . . 607
Henning *v.* Burnet . . . 244
Hennings *v.* Pauchard . . 164
Henriques *v.* General &c., to West Indies 179
Henry, Krell *v.* 130
Henson, Seaton *v.* . . . 42
Henty *v.* Wrey . . . 455, 458
Hepworth, Copley *v.* . . . 52
Herbert *v.* Blunden . . . 610
— Dod *v.* 3
— *v.* Torball 160
Herefordshire JJ., R. *v.* . . 169
Hernando, *Re*, Hernando *v.* Sawtell 631
Herne, Johnson *v.* . . . 17
Heron *v.* Stokes . . 446, 448, 449
Herring *v.* Brown . . 54, 79
Hersey, Billingsly *v.* . . . 102
Hersey, Wrangham *v.* . . 161
Hertford (Marquis), Southampton Lord *v.* 385
Heseltine *v.* Simmons . . 130
Heslop, Blunt *v.* 169
Hesse *v.* Albert 542
— *v.* Stevenson . . . 552
Hester, Belasyse or Bellasis *v.* . 166
Heuer, William Robinson and Co. *v.* 574, 576
Hewet *v.* Ireland . . . 418
Hewett, *Re*, Hewett *v.* Hewett . 606
Hewison *v.* Negus 204
Hewitt *v.* Wright . . . 376
Hewley's (Lady) Case . . . 63
Hewson, Wilcock *v.* . . . 17
Hext *v.* Gill 64, 77
Heydon, Leicester (Earl of) *v.* . 220
— Staple *v.* . . . 262, 265
Heyton, Calthorp *v.* . . 554, 555
Heyward's (Sir Roland) Case 55, 101
Heywood *v.* Heywood . . 414
Hibblewhite *v.* McMorine . . 2, 35
Hickie and Co., Sailing Ship Garston Co. *v.* 72
Hicks, Graves *v.* 454
— Lee Compere *v.* . . 369
— Oshey *v.* 174
Higgens *v.* Totherden . . 94
Higginbottom's Case . . 567, 568
PAGE
Higgins *v.* Macadam . . 169
Higginson *v.* Barneby . . . 628
— *v.* Kelly . . . 345
Higgon, Young *v.* . . . 169
Higham and Cooke's Case . . 166
— and Jessop, *Re* . . 167
Highway *v.* Banner . . 614, 615
Higinbotham *v.* Holme . . . 344
Hilbers *v.* Parkinson . . 47, 601
Hilditch, Farrall *v.* . 198, 490
Hill, Brewer *v.* 52
— *v.* Carr . . . 198, 484, 489
— *v.* Cooper 413
— *v.* Grange . 76, 90, 252, 253
— Hammond *v.* . . . 558
— *v.* Hill . . . 625, 626, 627
— *v.* Manchester Waterworks 194
— Mill *v.* 45, 86
— *v.* Patten 34
— Poole *v.* 519
— Schwarz, Parkin *Re* . . 589
Hillman, *Ex parte* . . . 204
Hills *v.* Cooper 95
Hinchinbroke (Lord) *v.* Seymour 458
Hinckley *v.* Maclarens . . . 399
Hinde *v.* Gray . . . 576, 577
Hindson *v.* Ashby 235
Hinton, *Ex parte* . . . 344
— *v.* Sparkes 506
Hiscocks, Doe *v.* . . . 110
Hitchcock *v.* Coker . . . 572
Hives, Adsetts *v.* . . . 34
Hoare *v.* Barnes 414
— *v.* Hornby . . 593, 595
— Reid *v.* 441
— Southcote *v.* . . . 521
Hobart, Stamford *v.* . 612, 615
— Windsmore *v.* . 288, 289
Hobbs, International Tea Stores Co. *v.* . . 240, 262
— *v.* Tuthill . . . 425
Hobert, Wright *v.* . . . 390
Hobson, Creswick *v.* . . . 314
— *v.* Middleton . . . 559
Hockin *v.* Cooke . . . 66
Hodges, Bower *v.* 486
— Lilly *v.* . . . 519
Hodgeson *v.* Bussey . . 77, 335
Hodgkin, Mount *v.* . . . 194
Hodgson, *Ex parte* . . . 345
— Bartlett *v.* . . . 488
— *v.* Bussy . . 77, 335
— *v.* Coppard . . . 487
— *v.* Field . . 115, 246
— Parker *v.* . . . 464
— Proctor *v.* . 263, 264
Hodkinson, Popplewell *v.* . . 259
Hodsel *v.* Bussy . . . 77, 335
Hodson, *Re*, Williams *v.* Knight 606
Hodson *v.* Coppard . . . 487
Hoffe's Estate Act, 1885, *Re* . 569, 580

PAGE
Hogg *v.* Cross . . . 281, 383
Holden *v.* Smallbrooke . . 302, 354
Holder *v.* Tayloe . . . 486
— *v.* Taylor . . . 499, 500
Holding *v.* Pigott . . . 133
Holford *v.* Parker 17
Holiday, Denison *v.* . . . 192
Holland, *Re*, Gregg *v.* Holland . 202
— *v.* Fisher 123
— Gregg *v.* . . . 202
— *v.* Holland . . . 488
— Rawley *v.* . . . 375
— Roberts *v.* . . . 520
— Sidebotham *v.* . . . 166
Holles *v.* Carr . . 198, 484, 489
Holliday, Haynes *v.* . . . 136
Holliday *v.* Overton . 182, 184, 330
Hollingworth *v.* Ascue . . 6, 11
Hollis *v.* Carr . . 198, 484, 489
Hollis Hospital Trustees and Hague's Contract, *Re*. 69, 385, 390
Holloway *v.* Holloway . . . 64
— Pursey *v.* . . 317
Holman *v.* Peruvian Nitrate Co. 163
— Swaine *v.* . . . 19
— Tredwen *v.* . . . 533
— *v.* Walden and Walden *v.* 177
Holme, Higinbotham *v.* . . 344
Holmes *v.* Bellingham . . 237
— *v.* Goring . . . 263, 264
— *v.* Ivy 83
Holmesdale, Sackville West *v.* . 609, 613, 615, 628
Holms *v.* Seller . . . 49, 241
Holroyd *v.* Marshall . . 508, 509
Holt *v.* Collyer 64
Homer *v.* Ashford . . . 572
Homersham, Payler *v.* . . 77, 192
Hone, Seagood *v.* . 81, 309, 339
Honor *v.* Honor . . 614, 629
Honywood *v.* Honywood . . 177
Hood *v.* Franklin . . . 602, 603
— Remnant *v.* . 457, 462, 478
— *v.* Stokes 397
Hood-Barrs, *Ex parte*, Lumley, *Re* 350, 616
Hooper, Giles *v.* 486
— Lacon *v.* . . . 157
— *v.* Ramsbottom . . 19
Hooper's Trust, *Re* . . . 603
Hope *v.* Clifden (Lord) . . . 481
— *v.* D'Hedouville . . 376
— French *v.* 208
— Gordon *v.* 481
— Tyrrell *v.* 129
— Edwardes, Blackburne *v.* 454
Hopehill *v.* Searle . . . 94
Hope Johnstone, *Re*, Hope Johnstone *v.* Hope Johnstone. 344
Hopgood *v.* Ernest. . . . 79
Hopkins, Field *v.* . . . 188
Hopkin's Trusts, *Re* . . . 416
Hopkinson, Bunny *v.* . . 549
— *v.* Lee 518
— *v.* Lusk . . 190, 232
Hopkyns, Howard *v.* . . . 504
Horde, Atkyns *v.* . . . 79
— Taylor *v.* 79
Hore *v.* Dix 48
Horlock, Sweetapple *v.* . . . 589
Hornby, Hoare *v.* . . 593, 595
Hornby, Weld *v.* 143
Horne *v.* Barton 626
Horner *v.* Flintoff . . . 507
— *v.* Graves . . . 577
Hornibrook, Pattle *v.* . . . 138
Horres *v.* Brushfield . . . 558
Horseman *v.* Abbey . . 406, 412
Horsfall *v.* Testar . . . 541
Horton, Hare *v.* . . . 18, 116
— Milner *v.* 546
— Powell *v.* 72
— Whitlock *v.* . . . 51
Horwood, Underhill *v.* . . . 19
Hosier, Lever *v.* . . . 223
Hosking *v.* Smith 209
Hoskins, Trenchard *v.* . 76, 552
Hotchkin *v.* Humfrey . . . 479
Hotham *v.* East India Co. . . 523
Hough *v.* Windus 65
Houghton-le-Spring, R. *v.* . 22
Houlder *v.* Weir 160
House Property and Investment Society, Sear *v.* . . . 488
Houstoun, Saltoun *v.* . . 198, 490
Howard, *Re* 464
— *v.* Ducane . . . 68
— *v.* Hopkyns . . . 504
— *v.* Maitland . . . 554
— *v.* Shrewsbury (Earl) . 182, 184, 186, 189, 217
— Tipping *v.* 409
— Topping *v.* 409
— *v.* Woodward . . 504, 507
Howard's (Sir R.) Case . . 164
— Trusts, *Re* . . 423, 469
Howard de Walden (Lord), St. Cross Master and Brethren *v.* 66
Howden, Smith *v.* . . . 237
Howe, Farmer *v.* 232
— Whittaker *v.* . . . 572
Howel, Croft *v.* 179
— *v.* Howel 615
Howell *v.* Gayler 407
— *v.* Richards . 121, 544, 549, 552
Howes, Morris *v.* . . . 407, 412
Howgate and Osborn's Contract, *Re* 30, 40
Howgrave *v.* Cartier . 476, 481
Howton *v.* Frearson . . 263, 265
Hoyle, Enthoven *v.* . . 30, 36

PAGE
Hubback, Hawkes *v.* . . . 349
Hubbard, Sharp *v.* . . . 158
Hubert *v.* Parsons . 464, 466, 471, 473
Hudleston, Johnstone *v.* . . 157
Hudson, *Re* 331
— *v.* Clementson . . . 72
— *v.* Revett . . 13, 34, 37
Hudson's (Lady) Case . . 14, 29
Hughes *v.* Bennet . . . 547
— *v.* Humphreys . . . 536
— Isaac *v.* 50
— Jayne *v.* . . . 174, 175
— *v.* Richman . . . 559
— *v.* Young 601
Hughes' Trust, *Re* . . . 596
Hughes and Ashley's Contract, *Re* 253
Huguenin, Davies *v.* . . 50, 434, 435, 457, 462
Hulbert *v.* Long 94
Hulme, Coles *v.* 88
Humble *v.* Langston . . . 35
Hume *v.* Rundell . . . 77
Humfreston's Case . . . 429
Humfrey *v.* Dale . 132, 135, 136
— Dale *v.* . . 135, 136
— Hotchkin *v.* . . 479
Humpage, Grafftey *v.* . 406, 407, 594, 596
Humphrey *v.* Tayleur . . 393
Humphreys, Hughes *v.* . . . 536
— St. Aubyn *v.* . . 587
Hungate, Att.-Gen. *v.* . . . 123
Hungerford *v.* Becher . . 198
Hungerford's Case . . 101, 103
Hunt *v.* Allen . . . 560, 561
— *v.* Baker 335
— Bateman *v.* . . . 208
— *v.* Bishop 278
— *v.* Danvers . 554, 555, 560
— Massam *v.* 254
— Morgan *v.* . . . 554, 555
— *v.* Remnant 278
— Shaw *v.* 179
— *v.* White 563
— White, *v.* 232
Hunter, Darson *v.* . . . 254
— Fowler *v.* . . . 79
— Marsam (Marsham, Marsum or Massam) *v.* 254
— *v.* Tedlie . . 403, 404
— Walker, *v.* . . . 62
— *v.* Walters . . 5, 208
Huntingdon, Reay *v.* . . . 50
Huntington (Earl of) and Lord Mountjoye's Case . . 49, 241
Hurd *v.* Fletcher . . . 79, 562
— *v.* Leach 157
Hurley, Northam *v.* . . . 49
Hurrell, Penhay *v.* . . . 375

PAGE
Hurst *v.* Hurst 50
Hurt, Hall *v.* 454
Hutchins *v.* Scott . . . 30, 37
Hutchinson, Bold *v.* . . . 629
— *v.* Bowker . . . 72
— Daintree *v.* . . . 72
— Featherston *v.* . . 200
— Metcalfe *v.* . . 453
— *v.* Prestwidge . . 364
— *v.* Savage . . . 276
— *v.* Tatham . . . 134
Hutchinson's Settlement, *Re* . 381
Hutton *v.* Brown 157
— *v.* Warren . . 131, 133
Hylton, Ramsden *v.* . . . 192
Hynes *v.* Redington . 449, 467

I.

Ibbetson *v.* Grote 590
Idle *v.* Cook . 300, 310, 313, 339
Iggulden *v.* May . 138, 148, 486, 499, 501
Iles, Bamford *v.* 191
Ilfracombe Ry. Co., Pickering *v.* 502
Imber, R. *v.* 123
Imperial Bank *v.* London and St. Katharine Docks Co. . . 136
Industrie, The 632
Ingilby, Campbell *v.* . . 537, 630
Ingleby *v.* Swift 182
Inglis *v.* Buttery . . . 64
Inman, *Re* 356
— Bland *v.* 23
Inns, Benwell *v.* . . 573, 577
Insall, Pimm *v.* 606
Inskip, Braybroke (Lord) *v.* . . 193
Insole, *Re* 413
International Co. of Mexico, Mercantile Investment, &c., Co. *v.* 169
International Tea Stores Co. *v.* Hobbs 240, 262
Ireland, Hewet *v.* 418
Ireson *v.* Pearman . . . 326
Irnham (Lord) *v.* Child 124, 127, 129
Irvine, M'Clintock *v.* . . 352, 357
— Rannie *v.* . . 572, 574
Irving, Mercer *v.* . . . 506
Irwin, *Re*, Irwin *v.* Parkes . . 332
— Hayton *v.* 135
Isaac *v.* Hughes 50
Isaacs, Collyer *v.* . . . 508
— *v.* Green 179
— *v.* Royal Insurance Co. . 172
Isaacson *v.* Harwood . . 488, 491
Isherwood *v.* Oldknow . . . 68
Ivall, Hastings Corporation *v.* . 143
Iven (or Ivens) *v.* Elwes 198, 199, 491, 493

PAGE
Ivison *v.* Gassiot 231
Ivy *v.* Gilbert 453
— Holmes *v.* 83

J.

J. S., Gregg *v.* 95
Jack *d.* Westby *v.* Featherstone 310, 312
— *d.* Alexander *v.* Jamieson . 356
— Leigh *v.* 235
— *v.* M'Intyre . . 221, 226
Jackman, Stanley *v.* . 621, 622
Jackson, *Re* 443
— Smith *v.* Sibthorpe . 396
— *v.* Ashburner . . 52
— Baillie *v.* 481
— Cupit *v.* 453
— Harrison *v.* 7
— *v.* Jackson 396
— Jenkins *v.* 555
— Madoc *v.* 450
— National Provincial Bank *v.* . . 4, 5, 7, 8
— *v.* N. E. Ry. Co. . 198, 491
— Rich *v.* 127
— Robertson *v.* . . . 62, 72
— Rous *v.* 386
— Sharp *v.* 15
Jackson's Will, *Re* 589
Jacob, Rowntree *v.* 207
— Shears *v.* 21
Jacobs *v.* Crédit Lyonnais . . 632
— *v.* Morris 230
— Smith, Att.-Gen. *v.* . 607
Jagoe, Mawle *v.* 588
James, *Re* 178
— *v.* Cochrane . 485, 496
— *v.* Durant 594
— *v.* Emery . . . 516, 519
— *v.* Hallett 314
— Hamilton *v.* 594
— *v.* James 594
— Nokes *v.* . . . 551, 552
— Osborn's Case . . 91, 94
— Phillips *v.* 309, 381, 616, 617
— Philpotts *v.* 355
— Pits *v.* 179
— *v.* Plant, and Plant *v.* . 251, 253, 260, 287
— Servante *v.* 519
— White *v.* 454
— Williams *v.* 244
Jamieson, Alexander *v.* . . 356
Janes *v.* Whitbread . . . 179
Janson, Hall *v.* 134
Jardine, *Ex parte* 225
Jarratt, Crompton *v.* . . . 230
Jay, Leach *v.* 67
Jayne *v.* Hughes . . 174, 175

PAGE
Jeaffreson's Trusts, *Re* . . . 336
Jeff *v.* Robinson 353
Jeffereys *v.* Small 396
Jeffery *v.* Jeffery 479
Jeffreys *v.* Reynous . . . 477
Jeffries, Deux *v.* 50
Jeffryes *v.* Evans 561
Jekyl, Williams *v.* . 352, 354, 425, 427
Jenkins, Ayerst *v.* 411
— *v.* Green 103
— Hanbury *v.* 251
— *v.* Jackson 555
— Price *v.* 204
— *v.* Quinchant . . . 451
— Richardson *v.* . 486, 488
— Woodhouse *v.* . 557, 558
— *v.* Young 363
Jenner *v.* Jenner 189
Jennings, Barnes *v.* 382
— Cook *v.* 532
Jerman *v.* Orchard 295
Jermin, Willis *v.* 9, 10
Jermyn *v.* Fellows 438
— *v.* Orchard 295
— and Cooper's Case . . 293
Jersey (Earl), Llewellyn *v.* . 215, 220
— Smith *v.* . 58, 68, 125
Jervis *v.* Berridge 129
— *v.* Wolferstan 607
Jervoise *v.* Northumberland (Duke of) . . 613
— Rubery *v.* 501
Jeston, Kerr *v.* 171
— *v.* Key 529
Jethro, Hamond *v.* 396
Jeudwine *v.* Agate 505
Jeyes, Pell *v.* 230
— *v.* Savage . . 476, 479
Joans, Hedley *v.* 173
— Meredith *v.* 363
Jocelyn *v.* Hawkins 158
John, Price *v.* 274
Johnson *v.* Baker 17
— Bloomfield *v.* 236
— Brown *v.* 163
— Chanter *v.* 3
— *v.* Edgware, &c., Ry. Co. . . 118, 230
— *v.* Herne 17
— Proctor *v.* 500
— *v.* Raylton 137
— Saunders *v.* 517
— Simons *v.* 192
— Warren *v.* 445
— *v.* Webster 273
Johnson Johnson, *Re*, Matthews, *Ex parte*, Wilkinson *v.* Johnson Johnson and Dibb . . . 344
Johnston, Mayfair Property Co. *v.* 240
Johnstone *v.* Hudleston . . . 157

PAGE
Jolley, Marsham (or Masham) *v.* 94
Jolly *v.* Arbuthnot . . . 197
— *v.* Masdame 94
— *v.* Young . . .62, 72, 158
Jonas, Corbett *v.* 269
— Syers *v.* 135
Jones, Att.-Gen. *v.* . . . 145
— *v.* Barkley . . . 530
— *d.* Blake *v.* Blake . . . 356
— *v.* Boyleson . . . 411
— Brown *v.* 48
— Campbell *v.* 527
— Cannock *v.* 486, 528
— Davis *v.* 18
— Frost *v.* 197
— *v.* Greaves, Greaves' Settled Estates, *Re* . . . 463
— *v.* Heavens 504
— *v.* Kearney . . 569, 580
— *v.* King, and King *v.* . . 564
— *v.* Laughton . . . 613
— *v.* Lavington . . 499, 563
— *v.* Littledale 136
— Macoubrey *v.* . . 432, 437
— *v.* Martin 607
— *v.* Merionethshire Permanent Benefit Building Society . . . 200
— *v.* Morley . . 51, 79, 360
— Reilly *v.* 506
— Samon *v.* 48
— (Lady Catherine), Say and Seal (Lord) *v.* . . 326
— *v.* Wait 223
— Waite *v.* 200
— *v.* Williams 48
— Williams *v.* 130
— Youde, *v.* 225
Jones' Will, *Re* . . . 596, 597
Jopp *v.* Wood . . .447, 470, 477
Jordan, Digby *v.* 164
Jorden *v.* Atwood . . 262, 265
Jordeson *v.* Sutton, Southcoates and Drypool Gas Co. . . 259
Judson *v.* Bowden 528
Julian, Kitson *v.* 191
June, Smy *v.* . . . 310, 314
Jupp, *Re*, Jupp *v.* Buckwell . 395

K.

Kain *v.* Old 127
Kane *v.* Kane 583
Katy, The 160, 163
Kay *v.* Oxley . . 251, 260, 261
Kayes, Dodson *v.* . 86, 92, 94, 175
Kean *v.* Strong, and Strong *v.* . 544, 545, 546
Keane *v.* Smallbone . . . 34
Kearney, Jones *v.* . 569, 580
PAGE
Kearney, Sunderland Marine Insurance Co. *v.* . . . 24
Keate, Barker *v.* . . . 78, 206
Keating, Wilson *v.* . . . 208
Keay *v.* Boulton 334
Keays *v.* Lane 348
Keele *v.* Wheeler 27
Keen and Keen, *Re*, Collins, *Ex parte* 510
Keightley *v.* Watson . 516, 520
Keith, Brooks *v.* . 583, 588, 599
— Cornmell *v.* . 589, 602
— Kidner *v.* . . 14, 18
— *v.* Pratt 12
Kell *v.* Charmer . . . 63
Kelly, Archer *v.* . . . 595, 599
— Higginson *v.* . . . 345
— Lowther *v.* 23
— *v.* Rodgers 563
Kelner *v.* Baxter . . . 502
Kelson, Watts *v.* . .244, 256, 258, 260, 261, 265, 268
Kemble *v.* Farren . . 505. 507
Kemeys, Wilkins *v.* . . . 52
Kemp, Davy *v.* 393
— *v.* Derrett 158
— Hawkins, *v.* 22
— Whateley *v.* . . . 614
— Wright *v.* . . 77, 340
Kempe, Davies *v.* 393
Kene's Case 311
Kendal *v.* Micfeild . . 292, 293, 353, 354, 355
Kendall *v.* Hamilton . . 514, 515
Keneday, Parker *v.* . . . 93
Kenisham *v.* Redding . . . 115
Kennedy *v.* Green . . . 209
Kennoway, Noble *v.* . . . 134
Kenny *v.* Browne 199
Kenrick, Reid *v.* . . . 586
Kensington *v.* Dolland . . 347, 348
Kensington, Rooke *v.* . . 229
Kentish *v.* Newman . . 87, 622
Kenyon *v.* Birks, Birks, *Re* . 427
Keppell *v.* Bailey 389
Kerr *v.* Cassidy . . . 352, 356
Kerr *v.* Jeston 171
Kerr *v.* Kerr . . . 283, 285
Kerr, Roberts *v.* 240
Kershaw *v.* Cox . . 34, 39
Kerslake *v.* White 252
Key, Jeston *v.* 529
Keyes, Dodson *v.* . 86, 92, 94, 175
Keys, Dobson *v.* . 86, 92, 94, 175
Kidd *v.* Boone 500
Kidd *v.* Frasier 400
Kidder *v.* West 44
Kidley, Salter *v.* . . . 195
Kidner *v.* Keith . . . 14, 18
Kilburne, Theebridge *v.* . . 335
Kilner *v.* Leech . . 401, 409

PAGE
Kilvert, Robinson *v.* . 270, 499, 555
Kinaston, Lacy *v.* . . 50, 510
Kinder, Coles *v.* 567
King, *Re*, King *v.* King . . 356
King *v.* Accumulative Assurance Co. 496
— Church *v.* 514
— *v.* Cotton, and Cotton *v.* . 14
— Crew *v.* 395
— *v.* Edwards 79
— Evans *v.* 177
— *v.* Hake 481
— Haynes *v.* 237
— *v.* Jones, and Jones *v.* . 564
— *v.* Lucas 348
— *v.* Melling 309
— *v.* Salway 145
— Skipper *v.* 479
— *v.* Smith 5, 209
— South African Breweries, Ltd. *v.* 632
King's (Auditor) Case . . . 295
Kingdon *v.* Tagert, Badcock, *Re* 630
Kinglake *v.* Beviss. 145
— Mattock *v.* . . . 527
Kingman, Reynold *v.* 288
Kingsbury *v.* Walter 442
Kingscote, Dand *v.* . . 245, 247
Kingsly, Roberts *v.* 629
Kingsmill *v.* Millard 217
Kingston *v.* Preston . . 523, 530
Kingston's (Duchess of) Case. . 194, 195
Kingswel, Worledg *v.* . . . 254
Kinnaston, Lacy *v.* . . . 50, 510
Kinnier, Atkyns *v.* . . . 506, 572
Kirby *v.* Green 156
Kirby *v.* Hansaker 561
Kirk, Davis *v.* 320
Kirkman and Reignold's Case . 288
Kirkman and Reignott's Case . 288
Kirsopp, Grieveson *v.* . . . 275
Kitson *v.* Julian 191
Knight *v.* Browne 344
— *v.* Cole, and Cole *v.* 192, 276
— Garnons *v.* 13
— *v.* Gravesend &c., Co. . 494
— *v.* Pursell 240
— R. *v.* 173
— Williams *v.* 606
Knill *v.* Williams 37, 38
Knipe, Aveling *v.* 396
Knotsford *v.* Eedes 49
— *v.* Gardiner . . . 231
Knott, Sidebotham *v.* 277
Knowles, Taws *v.* 264
Knox *v.* Simmonds 171
Krell *v.* Henry 130
Kungstead, Carter *v.* 360
Kynaston, Clayton *v.* . . . 50
— Dering *v.* 589
Kynaston, Lacy *v.* . . . 50, 510
Kynock, Cooper *v.* 371

L

Lacey, Lindley *v.* 130
Lachlan, Gardner *v.* 24
La Cloche, Spurrier *v.* 533, 631, 633
Lacon *v.* Hooper 157
Lacy *v.* Kinaston (Kinnaston *or* Kynaston) 50, 510
Ladbroke, Mills *v.* 520
Lade, Baker *v.*, and *v.* Baker . 48
— Barker *v.* 48
Laing, Charrington *v.* 507
Lainson *v.* Tremere . . 126, 194
Laird *v.* Briggs 67, 78
Laird, Clyde Navigation (Trustees) *v.* 148, 149
Lake, Bird *v.* 183, 504
— *v.* Craddock 396
— Gennings *v.* 253
— *v.* Gibson . . 396, 397
— *v.* Phillips 126
— Tyler *v.* . . . 346, 347, 348
Lambe *v.* Reaston 224
Lambert, Clements *v.* . . . 254
— Eeles *v.* 283
— *v.* Peyton 619
— *v.* Thwaites, . 447, 448, 449, 450, 451
— Ward *v.* 205
Lambourn *v.* McLellan . . . 230
Lambourne *v.* Cork . . 192, 207
Lamphier *v.* Drapes 352
Lamplugh, Shortridge *v.* . . . 374
Lampon *v.* Corke . . 192, 207
Lamport and Holt, Branckelow Steamship Co. *v.* . . . 160, 163
Lamson Pneumatic Tube Co. *v.* Phillips 573
Lane, Baker *v.* 48
— *v.* Coups 429
— *v.* Cowper 429
— *v.* Drinkwater 518
— Keays *v.* 348
— Maclurcan *v.* 189
— Milman *v.* 301
— *v.* Pannell 323
Lang, Burrows *v.* 258
— *v.* Gale . . 62, 78, 157
Langdale, Grattan *v.* 275
Langdon *v.* Goole 92
Langford, Avery *v.* 573
Langham *v.* Nenny 376
Langhorn *v.* Cologan 32
Langley *v.* Hammond. 260, 261, 268
Langston, Humble *v.* . . . 35
— *v.* Langston 91

PAGE
Lanning *v.* Lovering . . 556
Lansdowne *v.* Lansdowne . . 77
Lant *v.* Norris 484
Lantsbery *v.* Collier . . . 387
Laporte, Copland *v.* 513
Large *v.* Cheshire . . . 535, 539
Larkins, Currie *v.* . 470, 477, 478
Lassels *v.* Catterton . . . 567
Lathbury, Tait *v.* 626
Latimer, Clark, Muirhead & Co., Aldin *v.* 270
Laughton, Jones *v.* . . . 613
Laurie *v.* Lees 21, 22
Lavell, Magee *v.* 507
Lavington, Jones *v.* . . . 499, 563
Law, Searle *v.* 54
— *v.* Urlwin 52
— Guarantee and Trust Society *v.* Bank of England 394
Lawford *v.* Davies . . . 168
Lawrance *v.* Boston . . . 113
Lawrence, Harrington *v.* . . 423
— *v* Maggs . . 446, 449
— Martyr *v.* . . . 222
— Trevivan *v.* . . 194, 195
Lawson *v.* Burness . . . 72
— Cumberlege *v.* . . . 19
Lawton, Stevens *v.* . . . 445
— *v.* Ward 244
Lay *v.* Mottram . . . 198, 490
Lazarus *v.* Andrade . . . 509
Lea, Spicer *v.* 66, 152
— *v.* Whitaker 506
Leach, Hurd *v.* 157
— *v.* Jay 67
— Thompson *v.* . . . 14, 19
Leadley *v.* Evans 191
Leahy *v.* Dancer 203
Leahy, Wyse *v.* 127, 219
Leather Cloth Co. *v.* Lorsont . 573
Le Clair, Mourmand *v.* . . . 88
Le Countee de Huntington *v.* Le Seigneor Mountjoy . . 49
Le Despencer, Bankes *v.* . . 620
Ledsam, Russell *v.* 165
Lee, Alford *v.* 13
— Bolton *v.* 513
— *v.* Brace 77, 338
— *v.* Browne 123
— Hopkinson *v.* 518
— *v.* Lee 587, 597
— *v.* Magrath 54
— *v.* Matthews 204
— Stogdon *v.* 347, 349
Lee's, Sir Thomas, Case . . 102
Lee Compere *v.* Hicks . . . 369
Leech, Kilner *v.* . . . 401, 409
— *v.* Leech 29
— *v.* Schweder . . . 556
Leech's (Sir Simon) Case . 14, 19

PAGE
Leeds (Corporation), Beckett *v.* . 234, 236
— (Duke of), Pugh *v.* . . 164
— Welstead *v.* 603
— and County Bank *v.* Walker 39
Lees, Laurie *v.* 21, 22
— *v.* Lees . . 199, 622, 625
Legg *v.* Goldwire 629
— Graves *v.* . 523, 535, 536, 539
— *v.* Harlock 505
Leggott *v.* Barrett . . 125, 182
Legh *v.* Lillie 503
— Schenck *v.* . . 475, 477, 478
Leicester *v.* Biggs . 80, 82, 369
— (Earl of) *v.* Heydon . 220
Leicester's (Earl of) Case . . 79
Leidemann *v.* Schultz . . . 72
Leifchild's Case 202
Leigh *v.* Brace . . . 77, 338
— *v.* Gotyer 561
— *v.* Jack 235
— *v.* Leigh 178
— Morice *v.* 17
— *v.* Norbury . 421, 422, 428
— Sadler *v.* 162
— Stanley *v.* 620
Leighton *v.* Wales . 506, 572
Lelean, Field *v.* 136
Leman *v.* Whitley 126
Lempriere *v.* Martin . . . 354
Lennard's Case 55
Lenthal, Mead *v.* 123
Leonard *v.* Sussex . . 613, 615
Leonard's Case 55
Leonard Lovie's Case . . . 448
Lepingwell, Bunting *v.* . . 304
Le Rousseau *v.* Rede . . . 335
Lester *v.* Garland . 166, 344, 345
Letchford, Dearberg *v.* . . . 331
Leuson, Wilkes *v.* 365
Leventhorpe *v.* Ashbie . . . 334
Lever *v.* Hosier 223
Levett *v.* Withrington . . . 563
Levi, Gordon *v.* 447, 449
Levick *v.* Coppin 274
Levin *v.* Weatherall . . . 379
Levingston, Cole *v.* 377
Leviston, Lucy *v.* 562
Lewen, Moody *v.* 193
— & Mody's Case 193
Lewis *v.* Bingham . . . 30, 34
— *v.* Davies 48
— Gerard *v.* 498
— *v.* Helliar, or Hellior . . 556
— *v.* Lewis 356
— *v.* Madocks 587
— *v.* Marshall 69
— *v.* Rees . . . 370, 371, 372
— Bowle's Case . . 325, 427
Lewknor *v.* Mountague . . . 106

PAGE
Leyfield's (Doctor) Case . . 26
L'Herminier, *Re*, Mounsey *v.* Buxton 342
Liberator Society, General Finance, &c., Co. *v.* . 195, 198
Liberty & Co., Mappin Bros. *v.* . 237
Licensed Victuallers' Mutual Trading Association, *Re*, Audain, *Ex parte* . . . 73
Liddard *v.* Liddard . . . 621
— Thellusson *v.* . 247, 274
Lidwell, Roe *v.* 218
Liford's Case 248
Lightowler, Crossley & Sons *v.* . 265
Lilley *v.* Whitney 294
Lillie, Legh *v.* 503
Lilly *v.* Hodges 519
— *v.* Taylor 309
Limerick (Earl), Gray *v.* 188, 434, 435
Lincoln, Newcastle *v.* . . . 620
Lindley *v.* Lacey 130
Lindo *v.* Lindo 192
— Mocatta *v.* . . 477, 479
Lindow *v.* Fleetwood . . 626, 628
Lindsay, Codrington *v.* . . . 586
— *v.* Ellicott . . . 409
Line *v.* Stephenson 117, 499, 500, 546, 552
Linfield, Tullet *v.* 157
Linger, Tucker *v.* . . 64, 72, 78
Linn, Winston *v.* 537
Lisle *v.* Gray 327
Lister, Garrett *v.* 21
Littell, Wallis *v.* 18
Littledale, Jones *v.* 136
— *v.* Smeddle . . 87, 312
Littleham *v.* St. Leonards . . 31
Littleton, Clavell *v.* . . . 138
— and Pernes' Case . . 52
Liverpool Waterworks Co. *v.* Atkinson 191
Llanelly Ry. Co. *v.* L. & N. W. Ry. Co. . . . 202, 203
Llangunnor, R. *v.* 205
Llewellyn *v.* Jersey (Earl) 215, 220
Lloyd, Bailey *v.* 181, 185
— *v.* Bennett 18
— Chamberlain *v.* 49
— *v.* Cocker . . 479, 480
— Gabay *v.* 137
— *v.* Guibert 632
— *v.* Lloyd . . 77, 191, 630
— *v.* Passingham . 366, 367
— Symonds *v.* 72
— *v.* Tomkies 561
Lloyds Bank, Ltd. *v.* Bullock . 209
Lloyd & Sons, Baynes & Co. *v.* . 499
Loach, Barnes *v.* 271
Lock, Douglas *v.* . . . 246, 247
Locke, Bush *v.* 320
— Collins *v.* 534
Locke *v.* Dunlop 419
— Palmer *v.* 507
— *v.* Southwood 320
Lockwood, Scholefield *v.* . . . 196
Lockyer *v.* Savage 344
Loder, Trueman *v.* 136
Loftus, Harris *v.* 425
Logan *v.* Wienholt . . 504, 505
Loggin *v.* Tetherton 94
Loggins *v.* Titherton 94
London Assurance Co., Rucker *v.* 134
London, Brighton and South Coast Rly., Cooper *v.* . . . 536
London (Corporation) Charity Commissioners *v.* . . . 236, 238
London (Corporation), Chilton *v.* 390
London (Corporation), *v.* Riggs 263, 266
London and County Banking Co., Taylor *v.* 273, 278
London Freehold and Leasehold Property Co. *v.* Suffield . . 17
London Gas Light Co. *v.* Chelsea Vestry 524, 539
London Graving Dock Co., Union Lighterage Co. *v.* 256, 264
London Guarantie Co. *v.* Fearnley 524, 526, 529
London (Mayor, &c. of) *v.* Long . 147
London and North Western Rly. Co., Llanelly Rly. Co. *v.* 202, 203
London and North Western Rly. Co. *v.* Westminster Corporation 236
London and Provincial Bank, Powell *v.* . . 12, 35, 36, 37
London and St. Katharine Docks Co., Imperial Bank *v.* . . 136
London and South Western Rly. Co. *v.* Blackmore 192
London and South Western Rly. *v.* Gomm . . . 385, 386, 390
London and Yorkshire Bank *v.* Pritt 504
Long *v.* Buckeridge 364
— Hassell *v.* 191
— Hulbert *v.* 94
— London (Mayor, &c. of) *v.* 147
Longnor (Inhabitants), R. *v.* . 4, 12
Lonsdale, Walsh, *v.* 52
Lord *v.* Commissioners of the City of Sydney . . . 237
— Milroy *v.* 54
Lorsont, Leather Cloth Co. *v.* . 573
Lough, Dickson *v.* 507
Lound *v.* Grimwade 200
Lovatt *v.* Williamson, Whiston's Settlement, *Re* 331
Love *v.* Pares 501
— Willson *v.* 506
Lovel's (Lord) Case 306
Lovelace's Case 7

PAGE
Lovering, Lanning *v.* . . 556
Lovett *v.* Lovett . . . 195, 581
Lovie's (Leonard) Case . . 448
Low *v.* Burron . . . 357, 358
— Phillips *v.* 271
— Symons *v.* 161
Lowe, Faulkner *v.* . . . 511
— *v.* Peers . . 506, 507
Lowndes, Davies *v.* 178
— Gorst *v.* 165
Lowther *v.* Condon . . . 461
— *v.* Heaver . . . 52
— *v.* Kelly . . . 23
— *v.* Westmoreland (Earl of) 328
Lucan, *Re*, Hardinge *v.* Cobden 508
Lucas *v.* Brandreth (No. 2) 330, 342, 400
— *v.* Bristow . . . 135
— King *v.* 348
— Smith *v.* . . 46, 586, 606
Lucke *v.* Lucke 24
Luckley, Pattinson *v.* . . 31
Lucton School *v.* Scarlett . 147
Lucy *v.* Englefield . . . 49
— *v.* Leviston 562
Ludford *v.* Gretton . . . 173
Ludwell *v.* Newman . . . 553
Luke *v.* South Kensington Hotel Co. 19
Lumley, *Re*, Hood Barrs, *Ex parte* . 347, 350, 616
— *v.* Scarborough . . 197
— (Lord), Ward *v.* . . 31
Luscombe *v.* Yates . . . 178
Lusk, Hopkinson *v.* . 190, 232
Lutley, Ackland *v.* . . . 165
Luxton, Blake *v.* . . 354, 358
— Doe *d.* 307
Lyall *v.* Edwards 193
Lyburn *v.* Warrington . 27, 128
Lyde *v.* Lyde 334
Lydiate, Mathewson *v.* . 42, 513
Lyds, Mervyn *v.* . . 102, 109
Lyle *v.* Richards . . . 218
Lynch, Burnett *v.* 499
— *v.* Nelson. 294
— Randall *v.* 494
Lyndon *v.* Standbridge . 228, 231
Lynne Regis' (Mayor and Burgesses of) Case . . . 180
Lyon, Eaton *v.* 501
— Noon *v.* 401
— R. *v.* 3
Lyric Theatre, Ltd., Bunning *v.* 495
Lyster *v.* Dolland 396

M.

Mablethorpe (Overseers), Sharpley *v.* 148
PAGE
Macadam, Higgins *v.* . . 169
Macale, French *v.* . . . 504, 505
Macandrew *v.* Gallagher . . 49
Macaulay, Wrightson *v.* . . 318
McBride, Richards *v.* . . . 142
McCabe, Delmer *v.* . . 542, 565
MacCallum, *Re*, MacCallum *v.* MacCallum 15
McCarogher *v.* Whieldon . . 607
M'Clintock *v.* Irvine . . 352, 357
MacCullogh, Magennis *v.* . . 31
McCullom, Sanderson *v.* . 32, 39, 41
MacDonnogh *v.* Stafford . . 177
Macdougall, Harnett *v.* . . 351
Machel (Machell or Machil) *v.* Clark (Clarke or Clerk) . . 363
McIlroy, Rymer *v.* . . . 245
Macintosh *v.* Haydon . . . 38
— *v.* Midland Counties Ry. Co. 538
MacIntyre *v.* Belcher . . . 494
M'Intyre, Jack *v.* . . 221, 226
Mackell, Bolger *v.* 464
Mackenzie *v.* Allardes . . 588
— *v.* Childers . 198, 390, 485, 491
— *v.* Mackenzie . 406, 407
— Sandeman *v.* . 431, 439, 440, 441
Mackenzie's Settlement, *Re* 589, 602
Mackinnon, Foster *v.* . . 5
— Maitland *v.* . . 252
Mackintosh *v.* Pogose . 344, 345
M'Knight, Fazakerly *v.* . . 33
Mackreth, Wilson *v.* . . . 241
M'Laren *v.* Baxter . . . 179
Maclarens, Hinckley *v.* . . 399
McLean, Telegraph Despatch and Intelligence Co. *v.* . . . 495
Macleay, *Re* 317
McLellan, Lambourn *v.* . . 230
Maclurcan *v.* Lane . . . 189
McMorine, Hibblewhite *v.* . 2, 35
M'Nab *v.* Robertson . . . 258
Macnamara *v.* Carey . . 184, 186
— Martyn *v.* . . . 542
Macoubrey *v.* Jones . . 432, 437
McTavish, Crooke *v.* . . . 157
Maddocks, Rogers *v.* . . 573, 576
Maddox, Grant *v.* . 62, 72, 137
Maddy's Estate, *Re*, Maddy *v.* Maddy 195, 581
Madgwick, Carter *v.* . . . 295
Madoc *v.* Jackson 450
Madocks, Lewis *v.* . . . 587
Maffet, Wakefield *v.* . . . 477
Maffett, Hardman *v.* . . . 416
Magee *v.* Lavell 507
Magennis *v.* MacCullogh . . 31
Maggs, Lawrence *v.* . . 446, 449
Magrane *v.* Archbold . . . 505

PAGE
Magrath, Lee *v.* 54
— Moore *v.* . 186, 188, 227
Maguire *v.* Scully . . .618, 619
Maillardet, Weeks *v.* . . 30, 32, 36
Mainwaring, Miller *v.* . . 31, 194
— *v.* Newman . . 511
Mainwaring's Settlement, *Re* . 604
Maitland, Howard *v.* 554
— *v.* Mackinnon . . 252
— Willingale *v.* . . . 390
Major, R. *v.* 66
— *v.* Salisbury 192
Makepiece *v.* Fletcher . .369, 428
Malcolm *v.* Burford-Hancock, Hancock, *Re* 412
Malin, Wilkinson *v.* 222
Mallan *v.* May . . 62, 572, 575
Mallet, Palmer *v.* . . 520, 573, 577
Mallory's Case 301
Mallott *v.* Wilson . . 3, 15, 20
Maltster, Rowden *v.* 308
Manchester Brewery Co. *v.* Coombs 52
Manchester College *v.* Trafford . 120
Manchester and London Life, &c., Association, Fowkes *v.* . 108
Manchester, &c., Ry. Co., Teebay *v.* 127
Manchester Ship Canal Co. *v.* Manchester Racecourse Co. . 389
Manchester Waterworks, Hill *v.* 194
Mander *v.* Harris, March, *Re* . 395
Mandeville's Case . . 320, 325
Mangles, Withy *v.* . 399, 400, 402
Manlove *v.* Bale 128
Manning *v.* Chambers 345
— Mara *v.* 348
Manning's Case 343
Mannock, Grey *v.* 358
Manser's Case 4
Mansfield *v.* Peach 22
— Powys *v.* 430
Mapes, Foster *v.* 562
Mappin Bros. *v.* Liberty & Co. . 237
Mara *v.* Browne 376
— *v.* Manning 348
March, *Re*, Mander *v.* Harris . 395
Marchant *v.* Merton 7
Marcus, Edwards *v.* . . . 79, 80
Mare, *Re* 415
Margery Mortimer's Case . . 213
Margetson, Glynn *v.* 86
Margitson, Simpson *v.* . . 62, 78, 139, 156
Mariot *v.* Mascal 179
Markham *v.* Fox 33
— *v.* Gonaston . . . 33
Marlborough, Duke of, *Re* . . 126
— Blandford *v.* . 65, 612
— *v.* St. John's . 304
Marler *v.* Tommas 199

PAGE
Marriot *v.* Pascall 179
Marriott, Spencer *v.* 557
Marryat *v.* Marryat 491
Marsam *v.* Hunter 254
Marsh, Archer *v.* 572
Marshal *v.* Marshal 101
Marshall *v.* Baker 426
— *v.* Collett 408
— Davenport *v.* 413, 589, 591
— *v.* Frank . . . 52, 232
— Holroyd *v.* . . 508, 509
— Lewis *v.* 69
— Nind *v.* . 121, 544, 551
— *v.* Peascod 317
Marsham *v.* Hunter 254
— *v.* Jolley 94
Marsum *v.* Hunter 254
Mart, Steele *v.* . . .173, 174, 175
Martin, Cordwell *v.* 37
— Davis *v.*, Queensland Land and Coal Co., *Re* 36
— Hardy *v.* . . 504, 506
— Jones *v.* 607
— Lempriere *v.* 354
— North *v.* 328
— *v.* Pycroft 129
— Willis *v.* . . 91, 315, 448
Martindale, Anderson *v.* . . . 521
Marton, Baldwyn *v.* 297
Martyn, Brune *v.* 306
— *v.* McNamara 542
— Willis *v.* 91
Martyr *v.* Lawrence 222
Mascal, Mariot *v.* 179
Masdame *v.* Jolly 94
Masham, Jolley *v.* 94
Mason *v.* Chambers 123
— Davis *v.* 571
— *v.* Ogden 69
— Whitmore 345
Massam *v.* Hunt (or Hunter) . 254
Massey, Spark *v.* 413
Massy *v.* Rowen 347
Master *v.* De Croismar . . . 626
— *v.* Miller . 28, 31, 35, 38, 41
Mathew *v.* Blackmore 116
— Pratt *v.* 414
— *v.* Purchins . . . 65, 93
Mathews *v.* Whetton 79
Mathewson *v.* Lydiate . . . 42, 513
Mathewson's Case . . . 42, 513
Matson *v.* Booth 34
Matthews, Clements *v.* . . . 509
— Cox *v.* 257
— Lee *v.* 204
— *v.* Temple . 314, 392, 446
Mattock *v.* Kinglake 527
Matts *v.* Hawkins 240
Maugham *v.* Sharpe 179
— *v.* Vincent 414
Maunder, Tweedie *v.* 634

PAGE
Maurice, Staples *v.* 392
Mavor *v.* Davenport 488
Mawle *v.* Jagoe, O'Connell *v.* . 588
Maxim-Nordenfelt Guns and Ammunition Co. *v.* Nordenfelt, and Nordenfelt *v.* 571
Maxwell, Strickland *v.* 85
May, Iggulden *v.* 138, 148, 486, 499, 501
— Mallan *v.* . . 62, 572, 575
— Mellow *v.* 164
— *v.* Platt 542
— *v.* Woodward 513
Mayer, *Re* 6
Mayfair Property Co. *v.* Johnston 240
Mayhew *v.* Middleditch . . . 457
Mayn *v.* Mayn . . . 395, 621
Mayor, &c., of Merchants of the Staple of England *v.* Governor & Co. of the Bank of England 11, 13
Mead *v.* Lenthal 123
Meade's Trusts, *Re* 426
Meagham, *Re* 345
Mease *v.* Mease 126
Meath (Earl of), Brownlow *v.* . 51
Meek, Furness *v.* . . . 16, 18
Megret, *Re*, Tweedie *v.* Maunder 634
Melbourne Banking Corporation *v.* Brougham 198
Melling, King *v.* 309
Mellor, Addington (falsely called Mellor) *v.* 412
— Backhouse *v.* 172
— Bellhouse *v.* 172
— *v.* Walmesley . . 221, 240
Mellor's Policy Trusts, *Re* . . 623
Mellow *v.* May 164
Melsom, Giles *v.* 65
Melvill, Otter *v.* 593
Mendez, Gibbon *v.* 532
Mercantile Investment & General Trust Co. *v.* International Co. of Mexico . . . 169
— Marine Insurance Co. *v.* Titherington 163
Mercer *v.* Irving 506
Merceron *v.* Bragg 113
Merchants' Marine Insurance Co., Stewart *v.* 85
Mercier, Williams *v.* . 594, 595, 597
Meredith, *Re*, Chick, *Ex parte* . 46
— *v.* Joans 363
— *v.* Treffry 429
Merionethshire Permanent Benefit Building Society, Jones *v.* . 200
Merlott, Peckham *v.* . 319, 338
Merrick, Cother *v.* . . . 80, 81
Merricke, Arlington *v.* 191
Merrill *v.* Frame . 117, 500, 552
— *v.* Rumsey 324

PAGE
Merry *v.* Pownall 344
Merton, Marchant *v.* 7
Mervyn *v.* Lyds . . 102, 109
Meryon *v.* Collett . . 407, 408
Metcalfe *v.* Hutchinson . . . 453
— *v.* Rycroft . . . 7, 24
— *v.* York (Archbishop) . 508
Metham, Sleigh *v.* 48
Metropolitan District Asylum (Managers), Weston *v.* . . . 504
— Ry. Co., Ford *v.* . 261
— Ry., Newton *v.* . 18
Meux, Baggett *v.* . . 347, 350
Mexborough *v.* Wood. . . . 506
Meyler *v.* Meyler 331
Meyrick, Cholmondeley *v.* 449, 462, 477
— *v.* Meyrick . 108, 188, 228
— *v.* Wishaw 379
Micfeild, Kendal *v.* 292, 293, 353, 354, 355
Michael *v.* Scockwith 41
Michaell's Case 41
Michell, *Re*, Moore *v.* Moore 354, 355
Michell's Trusts, *Re* 187, 190, 599, 602
Micklethwait *v.* Newlay Bridge Co. 234
Middleditch, Mayhew *v.* . . . 457
Middlehurst, Hart *v.* 616
Middlesex (Clerk of Peace), Prison Commissioners *v.* . . . 127
Middleton, Abbott *v.* . . 43, 121
— Backhouse *v.* 453
— *v.* Barker 330
— Crofts *v.* 195
— Crosby *v.* 86
— Hallett *v.* 567
— Hart *v.* 158
— Hobson *v.* 559
— Pullen *v.* 308
— Willoughby *v.* 184, 585, 586, 600
Middleton's Will, *Re* 603
Midland Ry. Co., Page *v.* . 183, 563
— Counties Ry. Co., Macintosh *v.* 538
Midleton, Port *v.* 17
Mignan *v.* Parry 629
Migotti *v.* Colville 159
Milbourne *v.* Purchasers under assignees of Simpson . 48, 49
Milburn, Dashper *v.* 294
— *v.* Salkeld . . 48, 49
Mildmay's Case . . 201, 205, 206
Mile End Old Town (Trustees), East London Waterworks *v.* . 231
Miles, De la Warr (Earl) *v.* 144, 145
Milford, Bipus *v.* 109, 325, 373, 375
— *v.* Fenwike 319
— *v.* Peile 582

PAGE
Mill *v.* Hill 45, 86
Millar *v.* Turner 417
Millard, Kingsmill *v.* 217
Miller *v.* Gulson 622
— *v.* Mainwaring . . 31, 194
— Master *v.* . 28, 31, 35, 38, 41
— *v.* Tetherington . . 134
Millerd, Buckler *v.* . 106, 126
Millership *v.* Brookes . . . 18
Mills *v.* Banks 453
— *v.* Dunham . . 574, 576
— Hamilton *v.* 332
— *v.* Ladbroke . . . 520
— *v.* Mills, Gundry, *Re* . . 511
Milman *v.* Lane . . . 301
Milner *v.* Harewood (Lord) . . 606
— *v.* Horton . . . 546
Milroy *v.* Lord 54
Milsome, Saunders *v.* . 491, 500
Minor's Trust, *Re* 447
Minton, Francis *v.* . . 232, 275
Missouri Steamship Co., *Re* . 633
Mitchel *v.* Reynolds . 570, 571
Mitchell *v.* Colls . . . 414
— *v.* Darthez . . . 532
— *v.* Foster . . . 169
— Orr *v.* . . . 187, 189
— Steele *v.* . . . 563
— Whitby *v.* . 384, 386
Mitford, Pybus (or Pibus), *v.* 109, 325, 373, 375
Mitforth, Fenwick *v.* . . . 319
Mocatta *v.* Lindo . . 477, 479
Moffatt, Gayford *v.* . . . 266
Mogridge *v.* Clapp 53
Mollett, Robinson *v.* . . . 137
— *v.* Wackerbarth . . . 38
Mollineux, Tatton *v.* . . . 335
Molyneux, Bold *v.* . . . 75
Molyneux's Estate, *Re* . . 348
Monk, Peacock *v.* 202
Monkland Iron and Coal Co., Elphinstone (Lord) *v.* . . 506
Monpenson, Thornborough *v.* . 567
Monro, Eyre *v.* 607
Montague *v.* Sandwich (Earl of) 608
Montague's (Lady) Case . . 51
Montefiore *v.* Behrens . . . 345
Montrose Peerage Case . . 142
Monypenny *v.* Monypenny . 46, 77, 494
Moody, Cunningham *v.* . . . 448
— *v.* Lewen . . . 193
Moon, *Re*, Dawes, *Ex parte* 181, 185, 189, 275, 344
— Turner *v.* 549
— *v.* Whitney Union . . 136
Moor *v.* Parker 325
Moore, Bruner *v.* . 155, 157, 159
— Burchfield *v.* . . . 38
— Cramer *v.* . . . 582
PAGE
Moore *v.* Foley . . 148, 501
— *v.* Magrath . 186, 188, 227
— *v.* Moore 54
— *v.* Moore, Michell, *Re* 354, 355
— *v.* Simkin . . . 318
— Tennison *v.* . 433, 437
— Whatford *v.* . . 476, 479
— and Savil's Case . . . 83
— Stevens, Great Torrington Commons Conservators *v.* 235, 236
Moorsom, Neame *v.* . . 186, 278
Mordant's (Sir John) Case . . 205
More-Smyth, Mountcashell (Earl of) *v.* 355, 357
Morgan, *Ex parte* . . 138, 196
— Barksdale *v.* . . 57, 158
— Chetwynd *v.* 589
— *v.* Griffith 130
— *v.* Hunt . 554, 555, 560
— *v.* Morgan . . . 339
— Morgan's Patent Anchor Co. *v.* . . . 208, 492
— *v.* Stint 233
— *v.* Thomas 421
— Williams *v.* . . . 126
Morgan's Patent Anchor Co. *v.* Morgan 208, 492
Morice *v.* Leigh 17
Morland, Swain *v.* . . . 161
— Waite *v.* 413
Morley *v.* Bird 396
— Gordon *v.* 134
— Jones *v.* . . 51, 79, 360
Morrell *v.* Fisher . . 213, 215
Morris *v.* Barrett . . . 396
— Bayley *v.* . 310, 329, 339, 392
— *v.* Cantle . . . 334
— *v.* Delobbel-Flipo . . 510
— *v.* Edgington . . 253, 556
— *v.* Howes . . 407, 412
— Jacobs *v.* . . . 230
— Portmore *v.* . . . 127
— R. *v.* 223
— Venables *v.* 325, 326, 369, 370
— *v.* Wilford 193
Morrison, Crossfield *v.* . . 547
Morse *v.* Faulkner . 568, 580
Mortimer *v.* Slater . . . 403
Mortin, Baldwin *v.* . . . 290
Morton *v.* Blackmore . . 344
— R. *v.* 2, 3
— *v.* Woods . . . 197
Moseley *v.* Motteux . . . 194
— Pearks *v.* . . . 442
Moses, Goodright *v.* . . . 204
Mostyn *v.* Mostyn . 449, 470, 481
— *v.* West Mostyn Coal and Iron Co. 499
Motteux, Moseley *v.* . . . 194
Mottram, Lay *v.* . . 198, 490
Mouflet *v.* Cole 577

PAGE
Mounsey *v.* Buxton, L'Herminier, *Re* 342
Mount *v.* Hodgkin . . . 194
— *v.* Mount . . . 468
Mountague *v.* Bath . . . 78
— Lewknor *v.* . . 106
Mountcashell (Earl of) *v.* More-Smyth . . . 355, 357
Mountford, Digby *v.* . . . 93
Mountjoy and Huntingdon's Case 49, 241
Mountjoye (Lord) and the Earl of Huntington's Case . 49, 241
Mourmand *v.* Le Clair . . . 88
Mowatt *v.* Castle Steel and Iron Works Co. 11
Moxhay, Tulk *v.* 390
Muckelstone *v.* Thomas . . 486, 488
Mulgrave, Colyear *v.* . . . 606
Muller, Chattock *v.* . . . 98
— *v.* Trafford . . . 390
Mumford *v.* Gething . . 72, 573
Muncaster, Harrison *v.* . . 555
Munday, Drake *v.* . . . 51
Mundy *v.* Duke of Rutland . 98
Munns, Nervin *v.* . . . 549
Murdoch, Att.-Gen. *v.* 146
Murphy, Twaddle *v.* . . . 283
Murray *v.* Stair (Earl) . . 16, 17
Murton, Fleet *v.* . . . 136
Mutton's Case 393
Myers *v.* Catterson . . . 269
— *v.* Sarl . . . 70, 71, 72

N.

Naden, *Ex parte*, Wood, *Re* . 414
Nainby, Chesman *v.* . . 571, 575
Naldred *v.* Gilham . . . 14
Nally, Hagarty *v.* . . . 294
Nandick (*or* Nandike) *v.* Wilkes 504, 616
Napier, Chamberlain *v.* . 631, 634
Napper *v.* Allington (Lord) . . 567
Nash, *Re* 377
— *v.* Ash 49, 368
— *v.* Ashton (or Aston) . 552, 567, 568
— *v.* Flynn 16
— *v.* Palmer . . . 560, 562
— *v.* Watkins . . . 16
— Williams *v.* 165
National Bank of Australasia *v.* Falkingham and Sons . . 126
National Bank of New Zealand, Ward *v.* 19
National Provincial Bank *v.* Jackson 4, 5, 7, 8
National Society for Distribution of Electricity by Secondary Generators *v.* Gibb . . 514
PAGE
Navestock (Inhabitants), R. *v.* . 171
Nayler *v.* Wetherell . . . 447
Naylor Harrison *v.* . . . 615
Neal's Trusts, *Re* . . . 187
Neale *v.* Neale 411
— *v.* Ratcliff 539
— *v.* Turton 511
Neame *v.* Moorsom . . 186, 278
Neath Canal Navigation Co., Gwyn *v.* . . 82, 85, 186, 187
Neath Canal Co. *v.* Ynisarwed Colliery Co. 245
Needham *v.* Smith . . . 607
Needs, Gord *v.* 106
Negus *v.* Forster . . . 414
— Hewison *v.* 204
— Reynal 203
Neill *v.* Devonshire (Duke of) . 119, 144, 145
Nelson, Goss *v.* 464
— Lynch *v.* 294
— Ogdens, Ltd. *v.* . . . 495
Nelthorpe and Farrington *v.* Dorrington 29
Nenny, Langham *v.* . . . 376
Nervin *v.* Munns . . . 549
Nesbitt, Carnes *v.* 507
Neve *v.* Wolsey 373
Nevil *v.* Nevil 309
Nevil's Case 308
Nevill *v.* Nevill 378
— R. *v.* 231
New Beeston Cycle Co., Salton *v.* 154
Newby *v.* Harrison . . . 241
Newcastle-upon-Tyne (Pilots of), Bradley *v.* 147
Newcastle Corporation *v.* Att.-Gen. 141
Newcastle *v.* Lincoln . . . 620
Newcomen *v.* Barkham . . . 109
— *v.* Coulson . . . 244
Newlay Bridge Co., Micklethwait *v.* 234
Newman, *Re* 507
— *v.* Beaumond . . . 170
— Kentish *v.* . . 87, 622
— Ludwell *v.* . . . 553
— Mainwaring *v.* . . 511
— *v.* Newman . . . 201
Newsam, Pudsey *v.* . . 567, 568
Newson *v.* Smythies . . 528, 537
Newstead (Inhabitants), R. *v.* . 154
Newton *v.* Metropolitan Ry. . 18
— *v.* Osborne . . . 486
Nichol, Bowman *v.* . . . 37
Nicholas *v.* Chamberlain . . 253
Nicholls, Boreton *v.* . . 338, 339
— *v.* Stretton . . 574, 576
Nichols, Brown *v.* . . . 253
— Burton *v.* . . 338, 339
— *v.* Haywood . . . 41

PAGE
Nichols *v.* Ramsel 170
Nicholson, Constable *v.* . . . 390
— Frankland *v.* . . 177
— Heartley *v.* . . . 54
Nicol *v.* Nicol . . . 413, 414
Nicolson *v.* Wordsworth . . 20
Nielsen *v.* Wait 163
Nind, Currie *v.* 204
— *v.* Marshall . . 121, 544, 551
Nixon *v.* Hamilton 201
Noble *v.* Durell 66
— *v.* Kennoway 134
Noden *v.* Griffits 320
Noel *v.* Bewley . . . 568, 580
— General Accident Assurance Corporation *v.* 507
Nokes *v.* — 193
— *v.* James . . . 551, 552
Nokes' Case . . 117, 499, 500, 551
Noon *v.* Lyon 401
Norbury (Earl), Drew *v.* . 273, 278
— Leigh *v.* . . 421, 422, 428
Norden Steam Co. *v.* Dempsey . 137
Nordenfelt *v.* Maxim-Nordenfelt Guns and Ammunition Co. 571, 574
Norfolk's (Duke of) Case . . 337
Norman *v.* Foster . . 548, 552
Norman's Trust, *Re* . . . 415
Norrice's Case 485
Norris *v.* Hundred of Gawtry . 166
— Lant *v.* 484
— Reading *v.* 365
— Wicker *v.* 171
Norris' Case 222
North, *Re*, Hasluck, *Ex parte* . 167, 168
— Chalmers *v.* 404
— (Lord) *v.* Ely (Bishop of) 108, 228
— *v.* Martin 328
Northam *v.* Hurley 49
North British Australasian Co., Ltd., Swan *v.* 36
North Eastern Ry. Co. *v.* Elliot, and Elliot *v.* . 258, 259, 268, 269
North Eastern Ry. Co. *v.* Hastings 139, 148
North Eastern Ry. Co., Jackson *v.* 198, 491
Northen *v.* Carnegie . 352, 354, 375
North Lambeth Liberal and Radical Club, Ltd., Baxendale *v.* 246
North London Ry. Co., Richards *v.* 65
North Stafford Steel, &c. Co. *v.* Ward 116
Northumberland *v.* Egremont . 76, 436
Northumberland (Duke of) *v.* Evrington 547
PAGE
Northumberland (Duke of), Jervoise *v.* 613
Northumberland, R. *v.* . . . 123
Northumberland's (Duke of) Case 226
North Western Ry. Co. *v.* Whinray 191
Norton *v.* Frecker . . 357, 358
— *v.* Webster . 126, 139, 253
Nosworthy, Putt *v.* 6
Nugent (Lord), Goss *v.* . . . 125
Nunn, Goodisson *v.* 530
Nutley, Dyne *v.* 216

O.

Oakes, Smith *v.* 393
O'Connell, *Re*, Mawle *v.* Jagoe . 588
O'Connor, Cussen *v.* 573
Odell, Crone *v.* 445
O'Donnell *v.* O'Donnell . . 66
Official Receiver, Tailby *v.* . 508, 509
Offley, Scrope *v.* 50
Offly *v.* Warde 23
Ogden, Mason *v.* 69
Ogdens, Ltd. *v.* Nelson . . . 495
Ognel's Case 216
Ognell, Watts *v.* 365
O'Hagan, Viditz *v.* . . . 586, 635
Okeden *v.* Okeden 453
Old, Kain *v.* 127
Oldfield, Crowther *v.* 254
Oldknow, Isherwood *v.* . . . 68
Oliff, Saundeys *v.* . . . 252, 254
Oliphant *v.* Gerard, Gerard, *Re* . 588, 603
Olivant *v.* Wright 339
Oliver, Christmas *v.* . . . 194, 195
— *v.* Fielden . . . 532, 533
— *v.* Oliver 622
Ommaney, Robinson *v.* 511
O'Neill *v.* Bell 135
Onslow, *Re*, Plowden *v.* Gayford 406
— Vernon *v.* 94
Oppenheimer, Anderson *v.* . . . 556
Orchard, Germain *v.* 295
— Jerman *v.* 295
— Jermyn *v.* 295
O'Reilly, Gerrard *v.* 505
Orlebar's Settlement Trusts, *Re* . 482
Orme, *Re* 467, 473
Orme's Case 364
Ormsby, Crofton *v.* 630
Orr *v.* Mitchell 187, 189
Osborn *v.* Bellman 610
— *v.* Churchman 50
— Else (or Elie) *v.* . 323, 375
— Newton *v.* 486
— Roll *v.* 485
Osborne's Case 91, 94

PAGE
Osborne, Elice (or Elie) *v.* 323, 375
— Pruen *v.* 423
— Smith *v.* . . 568, 580
— White *v.* 188
Osbourn *v.* Rider 164
Osbourne, R. *v.* 147
Osbrey *v.* Bury 449
Osenay's (Abbott of) Case . . 90
Oshey *v.* Hicks 174
Osman *v.* Sheafe 48
Osmere *v.* Sheafe 48
Ossiter, Gier *v.* 53
Otter *v.* Melvill 593
Otway, Addison *v.* . 79, 223, 224
Otway's Estate, *Re* 219
Overbaugh, Rees *v.* 37
Overton, Holliday *v.* . 182, 184, 330
Owen *v.* Gibbons 317
— *v.* Smyth 91, 316
— Thomas *v.* . . . 267, 268
— Thorp *v.* 318
Owen's Trusts, *Re* 184
Oxley, Kay *v.* 251

P.

Packer *v.* Welsted . 262, 263, 264
Packhurst, Dormer *v.* 47, 77, 83, 90, 92
— Smith *v.* . 47, 77, 83, 90, 92
Page *v.* Midland Ry. Co. . 183, 563
— *v.* Soper 406
Paget *v.* Paget 33
Paget's (Lord) Case . 205, 374
Palgrave, Wingrave *v.* . . . 479
Palmer *v.* Blackburn . . . 73
— *v.* Cracroft 417
— *v.* Flesshees (Flessier or Fletcher) . 257, 266, 268
— *v.* Locke 507
— *v.* Mallet . 520, 573, 577
— Nash *v.* . . 560, 562
— Wills *v.* 109, 322, 325, 375
Palmer's Settlement, *Re* . . . 382
Pannell, Lane *v.* 323
Papillon *v.* Voice . . 327, 613
Paradise, Andrews *v.* . . 556, 561
Pares, *Re*, Scott-Chad, *Re*, Scott-Chad *v.* Pares . 602, 603
— Love *v.* 501
— Peacocke *v.* 437
Paris, Sparrow *v.* 506
Park, Sorsbie *v.* 516
Parker, Att.-Gen. *v.* . . 141, 147
— Caldwell *v.* 40
— Carpenter *v.* 562
— *v.* Clarke 208
— Cleer (Sir Edward) *v.* . . 53
— Clere (Sir Edward) *v.* . . 53
— Granew *v.* 405
PAGE
Parker *v.* Hodgson 464
— Holford *v.* 17
— *v.* Keneday 93
— Moor *v.* 325
— *v.* Rennady 93
— Scavage *v.* . . 164, 166
— *v.* Tenant 11
Parkes, Irwin, *Re* 332
Parkhurst *v.* Smith 47, 77, 83, 90, 92
Parkin, *Re*, Hill *v.* Schwarz . 589
— Cole *v.* 37
Parkington, Dollar *v.* . . . 169
Parkinson *v.* Dashwood . . 581
— Hilbers *v.* . . 47, 601
Parrott, *Re*, Walter *v.* Parrott . 621
Parry *v.* Dale 95
— Mignan *v.* 629
— Taylor *v.* 224
Parsons, Harms *v.* 573
— Hubert *v.* 464, 466, 471, 473
Parteriche *v.* Powlet . . . 124
Partridge, Smith *v.* 462
Partrose's Case 95
Partyn *v.* Roberts 629
Pascall, Marriot *v.* 179
Pasmore, Bushel *v.* 17
Passingham, Lloyd *v.* . 366, 367
Paston *v.* Genney . . . 98, 99
Patch *v.* Shore 607
Paterson, Green *v.* . 606, 607
Patten, Hill *v.* 34
Pattinson, Devonshire (Duke of) *v.* 235
— *v.* Luckley 31
Pattle *v.* Hornibrook . . . 138
Patton, French *v.* . . 33, 34, 37
Pauchard, Hennings *v.* . . . 164
Paul, Wilson *v.* 376
Pawlett *v.* Pawlett 460
Pawson *v.* Brown 411
Payler *v.* Homersham . . 77, 192
Payne, R. *v.* 231
Peach, Mansfield *v.* 22
Peacock *v.* Eastland . . 20, 364
— Grymes *v.* . 252, 254
— *v.* Monk . . 202, 203
— *v.* Spooner 336
Peacock's Trusts, *Re* 347
Peacocke *v.* Pares 437
Peade, Gervis *v.* 543
Peake *v.* Penlington 626
Pearce *v.* Graham 591
— *v.* Watts 98
Pearks *v.* Moseley 442
Pearman, Ireson *v.* 326
Pears, Watson *v.* 164
Pearsall *v.* Summersett . . . 191
Pearse *v.* Baron . . . 626, 627
Pearsey, Pring *v.* . . . 237, 239
Pearson, Brooke *v.* 344
— Grey *v.* . 43, 46, 63, 121

PAGE
Pearson *v.* Spencer . 262, 263, 264
Peart, Hall *v.* 215
Peascod, Marshall *v.* 317
Peck and School Board for London, Contract between, *Re* 253, 261
Peckham *v.* Merlott . . 319, 338
— R. *v.* 157
Pedder's Settlement Trusts, *Re* . 592, 596
Peers, Lowe *v.* . . 506, 507
Peile, Milford *v.* 582
Peles and Jervies' Case . . . 543
Pell *v.* Jeyes 230
Pellew *v.* Hundred of East Wonford 167
Pells *v.* Brown 386
Pelly *v.* Royal Exchange Assurance Co. 134
Pelton Bros. *v.* Harrison . . 345
Pemberton *v.* Vaughan . . . 572
Pendlebury, Fraser *v.* . . . 196
Penfold *v.* Abbott 499
Penhay *v.* Hurrell 375
Penlington, Peake *v.* 626
Penning *v.* Plat 561
Penson, Griffiths *v.* . 108, 217, 224
Penton, Davies *v.* . . 505, 507
Pepler, Taunton *v.* 5
Peppin *v.* Cooper 191
Perfect *v.* Curzon (Lord) 475, 481
Perkin, Bland *v.* 598
Perkins *v.* Thornton 630
Perls *v.* Saalfeld 575
Perratt, Winter *v.* 318
Perrin, Gorrissen *v.* 72
Perry *v.* Barnett 137
— *v.* Bowes 22
— *v.* Edwards 560
— *v.* Watts 49
Perryman's Case 17, 18
Perryn *v.* Allen 52
Peruvian Nitrate Co., Holman *v.* 163
Pet and Cally's Case 567
Peterson, Rolfe *v.* 505, 506
Petit, Hales *v.* 394
Petre, Pryor *v.* 235
Petrie, Boyd v. 183
Pettoe, Goodtitle *v.* 206
Petty *v.* Styward 396
Peyton, Lambert *v.* 619
Philipson, Eastern Counties Ry. Co. *v.* 538
Phillipps *v.* Briard 135
Phillips, Bartlett *v.* 304
— Browne *v.* 507
— *v.* Clift 537
— *v.* Edwards . . . 14, 18
— *v.* Garth 399
— *v.* James 309, 381, 616, 617
— Lake *v.* 126

PAGE
Phillips, Lamson Pneumatic Tube Co. *v.* 573
— *v.* Low 271
— *v.* Probyn 411
— Williams *v.* 252
Philpotts *v.* James 355
Phœnix Fire Assurance Co., Trainor *v.* 533
Pibus *v.* Mitford . 109, 325, 373, 375
Picciotto, Hemans *v.* 543
Pickard, Wooley *v.* 48
Pickering *v.* Ilfracombe Ry. Co. . 502
Pickersgill *v.* Grey. 357
Piggot, Shury or Surrey *v.* . . 258
— Walter *v.* 93
— Tipping *v.* . 319, 377
Piggott, Wilson *v.* . . . 53, 199
— Winscombe *v.* . 5, 28, 39
Pigot *v.* Salisbury 291
— Sury *v.* 258
— Walter *v.* 93
— Winchcombe *v.* . 5, 28, 39
Pigot's Case . . . 5, 28, 30, 39
Pigott, Holding *v.* 133
— Shewry *v.* 258
— Wilder *v.* 606
Pike *v.* Fitzgibbon 349
Pildredge, Brett *v.* 338
Pilkington *v.* Scott. 572
— Wilson *v.* . . . 408
Pilsworth *v.* Pyet 293
Pimm *v.* Insall 606
Pincke, Shove *v.* 49
Pinckney, Williams *v.* . . . 275
Pincombe, Rudg *v.* 485
— *v.* Rudge 485
Pinder *v.* Pinder 404
Pinnington *v.* Galland 262, 263, 265
Piper, Saunderson *v.* 99
— Wise *v.* 626
Pitfield's Case 461
Pits *v.* James 179
Pitt, Combe *v.* 161
Plant *v.* James, and James *v.* 251, 253, 260, 287
Plat, Penning *v.* 561
Platt, May *v.* 542
Plowden *v.* Cartwright . . . 52
— *v.* Gayford, Onslow, *Re* 406
Plummer, Collins *v.* 614
— Webb *v.* 121, 133, 494, 501
Plumstead Board of Works *v.* British Land Co. . . 233, 235
Plumtree, Wright *v.* 405
Pocklington, Smith *v.* . . . 499, 515
Pogose, Mackintosh *v.* . . 344, 345
Polden *v.* Bastard . . . 256, 267
Pollard *v.* Gare . . . 269, 270
Polley *v.* Polley 318
Pomfret *v.* Ricroft 265
Ponesley *v.* Blackman 51

PAGE
Pook, Dowden and Pook, Ltd. *v.* 571, 577
Poole *v.* Hill 519
Poole and Clarke's Contract, *Re* 511
Poor, or Poore, Bowles *v.* . 292, 353
Pope, Stock *v.* 223
— Stoke *v.* 223
— *v.* Whitcombe 228
Popham, Bamfield *v.* 338
— , Thomas *v.* . 155, 163
Popplewell *v.* Hodkinson . . 259
— Tebbe *v.* 48
Pordage *v.* Cole 494, 524, 526, 527, 529, 531, 535
Porry *v.* Allen 52
Port *v.* Midleton 17
Porter, Cubitt *v.* 240
— Sacheverell *v.* 251
— *v.* Shepherd 523
— *v.* Swetnam 486
Porter's Case 374
Porthgain Harbour Co., Ltd., Hart *v.* 510
Portmore *v.* Morris 127
Pott *v.* Brassey, Allnutt, *Re* 583, 588, 604, 605
— *v.* Todhunter 203
Potter, Anson *v.* 69
Pougett *v.* Tomkyns 177
Poulet *v.* Poulet 460
Poulson *v.* Wellington . 53, 199
Poulton, Rose *v.* 511
Poussard *v.* Spiers & Pond . . 536
Powell, Bradley *v.* 461
— *v.* Brodhurst 517
— *v.* Divett 38
— *v.* Horton 72
— *v.* London and Provincial Bank . . 12, 35, 36, 37
— *v.* Price 618
— Seabourne *v.* . 566, 568, 579
— *v.* Smith 103
— Stevenson *v.* 557
— Sumner *v.* 513
Power, Addis *v.* 179
Powis *v.* Burdett . . 462, 480
— Butler *v.* 504
Powlet, Parteriche *v.* 124
Pownall, Merry *v.* 344
Powys *v.* Mansfield 430
— Smallman *v.* . . . 50, 359
Pratt, Evans *v.* 72
— Keith *v.* 12
— *v.* Mathew 414
Prebble *v.* Boghurst 504, 505, 591, 616
Prendergast, Gabb *v.* 314, 418, 419
Prescot *v.* —— 176
Prescott, Campbell *v.* 376, 472, 473
Prestley, Chanudflower *v.* . . . 561
Preston, Burgh *v.* . . . 27, 128
— Kingston *v.* . 523, 530
PAGE
Preston, Robinson *v.* . . . 395, 396
— (The Lady), Titus *v.* . . 158
(Preston's Will) Att.-Gen. *v.* Fishmongers' Co. 145
Prestwidge, Hutchinson *v.* . . . 364
Price, Curtis *v.* . . . 324, 370, 371
— *v.* Dyer 103
— Franks *v.* 611
— *v.* Green, and Green *v.* . . 506, 572, 575
— *v.* Jenkins 204
— *v.* John 274
— Powell *v.* 618
— Sellin *v.* 32
Pride, Spring *v.* 351, 598
Priestley, Chantflower *v.* . . . 561
Primrose *v.* Bromley 514
Prin *v.* Heath 41
Prince *v.* Green 206
— Starling *v.* 48
Prince's (The) Case 384
Pring *v.* Pearsey . . 237, 239
Pringle *v.* Pringle . . 376, 377
Prison Commissioners *v.* Clerk of the Peace for Middlesex . . 127
Pritt, London and Yorkshire Bank *v.* 504
Proby, Bastard *v.* 614
Probyn, Phillips *v.* 411
Procter *v.* Johnson. 500
Proctor, Bache *v.* . . . 83, 88
— Green *v.* 52
— *v.* Hodgson . . . 263, 264
— *v.* Sargent 572
Prosser, Collins *v.* . . . 42, 513
Proud *v.* Bates 247
Prowse *v.* Abingdon 459
— *v.* Worthinge 448
Pruen *v.* Osborne 423
Pryor *v.* Petre 235
— *v.* Pryor 79
— Rosewell *v.* 257
Prytherch, *Re*, Prytherch *v.* Williams 439
Pudsey *v.* Newsam. . 567, 568
Puget, Targus *v.* 87
Pugh *v.* Drew 304
— *v.* Leeds (Duke of) . . . 164
— *v.* Robinson 161
— *v.* Stringfield 519
Pullen *v.* Middleton 308
Pulteney, Cavan (Lady) . . . 558
Purchaser under assignees of Simpson, Milbourne *v.* . 48, 49
Purchins, Mathew *v.* 93
Pursell, Knight *v.* 240
Pursey *v.* Holloway, Baker, *Re* . 317
Putt *v.* Nosworthy 6
Pybus *v.* Mitford . 109, 325, 373, 375
— *v.* Smith 351
Pycroft, Martin *v.* 129

PAGE
Pye, *Ex parte* 430
— *v.* Daubuz 566
Pyer *v.* Carter . . 256, 265, 268
Pyet, Pilsworth *v.* 293
Pym *v.* Campbell . . 17, 138
— Yates *v.* 132, 136

Q.

Queen's Club, Wilson *v.* . . . 269
Queensland Land and Coal Co., *Re*, Davis *v.* Martin . . . 36
Quicke *v.* Chapman 255
Quinchant, Jenkins *v.* 451

R.

R. *v.* Adderley 166
— *v.* Archdall 142
— Bainton *v.* 359
— *v.* Bellringer 147
— *v.* Billinghurst 179
— *v.* Canterbury (Archbishop of) 141, 148
— *v.* Capper 123
— *v.* Chawton (Inhabitants of) 62, 78, 158, 159
— *v.* Chester (Bishop of) . 123, 180
— *v.* Chester (Mayor of) . . 147
— Churchward *v.* 497
— *v.* Cumberland Justices . . 169
— *v.* Cussens 159
— *v.* Davie 147
— *v.* Dulwich College . . . 146
— *v.* Fauntleroy 3
— *v.* Gamlingay (Inhabitants of) 172, 173
— *v.* Goodenough 169
— *v.* Great Wakering . . 515
— *v.* Harrow (Inhabitants of) . 172
— *v.* Herefordshire Justices . 169
— *v.* Houghton-le-Spring . . 22
— *v.* Imber 123
— *v.* Knight 173
— *v.* Llangunnor (Inhabitants of) 205
— *v.* Longnor (Inhabitants of) . 4, 12
— *v.* Lyon 3
— *v.* Morris 223
— *v.* Morton 2, 3
— *v.* Navestock (Inhabitants of) 171
— *v.* Nevill 231
— *v.* Newstead (Inhabitants of) 154
— *v.* Northumberland, the Case of Mines 123
— *v.* Osbourne 147
— *v.* Payne 231
— *v.* Peckham 157
— *v.* Rochester (Bishop of) and Sir F. Clerke 123

PAGE
R. *v.* St. Mary, Warwick 160, 162
— *v.* St. Paul, Covent Garden (Inhabitants of) . . 6
— *v.* Scammonden . . . 203
— *v.* Scot 141, 148
— *v.* Shropshire Justices . . 169
— *v.* Sion (Abbess of) . . 284
— *v.* Skiplam (Inhabitants of) . 171
— *v.* Stevens and Agnew . 171, 172
— *v.* Stoke-upon-Trent (Inhabitants of) 72
— *v.* Swyer 154
— *v.* Syderstone (Inhabitants of) 160 162
— *v.* Varlo . . 143, 144, 146
— *v.* West Riding Justices . 169
— *v.* Worminghall (Inhabitants of) 153
— Yeoman *v.* 163
Rabbeth *v.* Donaldson, Abdy, *Re* 414
Radcliffe *v.* Bartholomew . . 168
— Day *v.* . . 477, 479
Raffles *v.* Wichelhaus . . . 65
Rafter, Davenant *v.* 106
Raikes *v.* Anderson . . . 276
Railway and Electric Appliances Co., *Re* 497
Railway Sleepers Supply Co., *Re* 169
Raincock, Young *v.* . 196, 552
Raindle, Brown *v.* 606
Ralph *v.* Carrick . . . 68, 421
Ramsbottom, Hooper *v.* . . . 19
Ramsden *v.* Hylton . . . 192
— *v.* Smith 492, 584, 585 587
Ramsel, Nichols *v.* 170
Randall *v.* Lynch 494
— *v.* Willis 629
Ranking's Settlement, *Re* . . 401
Rannie *v.* Irvine . . 572, 574
Rashleigh *v.* South Eastern Ry. Co. 485, 496
Ratcliff *v.* —— 561
— Neale *v.* 539
Rathbone, Early *v.* . 219, 230, 232
Rawley *v.* Holland . . . 375
Rawlings *v.* Walker . . . 384
Rawlins, Glassington *v.* . . 169
Ray, *Ex parte* 348
— *v.* Hazeldine . . . 256, 264
Raylton, Johnson *v.* . . . 137
Raynes, Gordon *v.* . 463, 465, 479
Read *v.* Erington 319
— Freeman *v.* . . . 159, 169
Reading *v.* Norris 365
Reaston, Lambe *v.* 224
Reay *v.* Huntingdon 50
Redding, Kenisham *v.* 115
Rede, Le Rousseau *v.* 335
Redington, Hynes *v.* . . 449, 467
Reed, Freshfield *v.* 21
— Gale *v.* 571

PAGE
Rees, Lewis *v.* . . 370, 371, 372
— *d.* Chamberlain *v.* Lloyd . 49
— *v.* Overbaugh . . . 37
Reeves *v.* Barlow . . . 510
— *v.* Watts 179
Reid *v.* Fairbanks . . . 295
— *v.* Hoare 441
— *v.* Kenrick 586
— *v.* Reid 346
Reilly *v.* Booth 246
— *v.* Fitzgerald . 464, 467, 478
— *v.* Jones 506
Reindel *v.* Schell 507
Reis, *Re*, Clough, *Ex parte* 509, 587
Remnant *v.* Hood . 457, 462, 478
— Hunt *v.* 278
Remon *v.* Hayward . . . 65
Render, Edmundson *v.* . . . 578
Rendlesham, Thellusson *v.* . . 67
Rennaday, Parker *v.* . . . 93
Renwick *v.* Daly . . . 285
Repington, *Re*, Wodehouse *v.* Scobell 564
Repps *v.* Bonham . . 313, 314
Reps *v.* Babham . . . 313, 314
Retburg, Cochran *v.* . . . 163
Revett, Hudson *v.* . 13, 34, 37
Reynal, Negus *v.* . . . 203
Reynardson, Gataker *v.* . . . 582
Reynold *v.* Kingman . . . 288
Reynolds *v.* Bridge . . . 506
— *v.* Ellis, Bankes, *Re* . 605, 635
— Mitchel *v.* . . 570, 571
Reynous, Jeffreys *v.* . . . 477
Rhodes, Barlow *v.* . 219, 252, 260
— *v.* Forwood . . . 497
Rice *v.* Rice 208
Rich, Dwyer *v.* 234
— *v.* Jackson 127
— *v.* Rich 546
— *v.* Wilson 460
Richards *v.* Ceely . . . 52
— Compton *v.* . 257, 266, 271
— *v.* Delbridge . . . 54
— Gilbertson *v.* . 361, 367
— Harman *v.* . 79, 129, 203
— Howell *v.* 121, 544, 549, 552
— Lyle *v.* 218
— *v.* McBride . . . 142
— *v.* North London Ry. Co. 65
— Rooke *v.* . . 164, 170
— *v.* Rose 268
— *v.* Sely 51
— Stirum *v.* . . 434, 436
Richardson, Baker *v.* . . . 218
— Cottee *v.* 52
— *v.* Goodman . . 472
— *v.* Harrison . . 327
PAGE
Richardson *v.* Jenkins . 486, 488
— Wakefield *v.* . . 437
— *v.* Wilson . . 59
Richman, Hughes *v.* . . . 559
Rickman *v.* Carstairs . . . 45
Ricroft, Pomfret *v.* . . . 265
Rider, Osbourn *v.* . . . 164
Ridler, *Re* 204
Rigby *v.* Bennett . . 258, 271
— Burton *v.* 315
— *v.* Great Western Ry. . 487
Rigden *v.* Vallier . 48, 396, 397
Riggs, London (Corporation) *v.* 263, 266
Right *v.* Bucknell . . . 195, 197
— *v.* Day . . . 337, 340
— *d.* Green *v.* Proctor . . 52
— *d.* Basset *v.* Thomas . . 52
Rimmer *v.* Webster . . . 209
Ringer *v.* Cann . . . 230, 232
Ripley *v.* Waterworth . 354, 355, 376
Risley, German *v.* . . . 205, 206
— Hales *v.* . . . 391, 392
— Smith *v.* . . . 205, 206
Ritchie *v.* Atkinson . . . 539
Rivers, *Re* 440
— *v.* Derby . . 457, 458
Roberts *v.* Akeroyd, Akeroyd's Settlement, *Re* . 89, 376
— *v.* Barker . . . 133
— *v.* Brett . . 523, 526, 532
— Carr *v.* 490
— *v.* Dixwell . . 318, 613
— Falmouth (Earl of) *v.* . 31
— *v.* Holland . . . 520
— *v.* Kerr 240
— *v.* Kingsly . . . 629
— Partyn *v.* 629
Robertson *v.* Clarke . . . 73
— *v.* French . . 27, 57
— *v.* Jackson . . 62, 72
— M'Nab *v.* 258
Robinson, Boddington *v.* . . 296
— Brandon *v.* . . . 345
— Cooper *v.* . . . 175
— *v.* Dickenson . . . 410
— *v.* Duleep Singh . . 72
— *v.* Evans . . . 409
— Fursaker *v.* . . . 568
— *v.* Gandy ; Garnett, *Re* 594
— Jeff *v.* 353
— *v.* Kilvert . 270, 499, 555
— *v.* Mollett . . . 137
— *v.* Ommaney . . . 511
— *v.* Preston . . 395, 396
— Pugh *v.* 161
— *v.* Shaw ; Shaw, *Re* . 420, 421
— Tursaker *v.* . . . 568
— *v.* Waddington . . 168
— *v.* Walker . . . 513

PAGE
Robinson *v.* Wharrey . . . 323
Roche *v.* Roche 625
Rochester (Bishop of) and Clerke, R. *v.* 123
Rochester (Corporation of), Att.-Gen. *v.* 148
Rochfort *v.* Fitzmaurice . 91, 316, 427, 428, 610, 611, 612, 613, 615
Roddy *v.* Fitzgerald . 64, 67, 121
Rodgers, Kelly *v.* 563
Roe *d.* Noden *v.* Griffits . . 320
— *d.* Bamford *v.* Hayley . . 87
— *d.* Wrangham *v.* Hersey . 161
— *v.* Lidwell 218
— *v.* Siddons 255
— *d.* Wilkinson *v.* Tranmarr (or Tranmer) . . . 48, 383
— *d.* Conolly *v.* Vernon & Vyse 214, 215, 219
— *d.* Berkeley *v.* York (Archbishop) 31
Roffey *v.* Bent 559
Rogers *v.* Davis 172
— *v.* Maddocks . . 573, 576
— Warriner *v.* 54
Rolfe, Emperor *v.* 461, 462, 474, 476, 477
— *v.* Peterson . . 505, 506
— *v.* Rolfe 572
Roll *v.* Osborn 485
Rolles, Yates *v.* 521
Rolls *v.* Yate 521
Romney, Bradford *v.* 598
Rooke *v.* Kensington 229
— *v.* Richards . . . 164, 170
— *v.* Rooke 449
— and Richard's Case . 164, 170
Rooper *v.* Harrison 277
Roos *v.* Awdwick 281
Roots *v.* Williamson 40
Roper *v.* Bartholomew . . 504, 505
Rorke *v.* Errington . . 220, 226
Roscarriot, Waldron *v.* 223
Rose *v.* Bartlett 231
— Cousens *v.* 245
— *v.* Poulton 511
— Richards *v.* 268
Rosewel's Case 568
Rosewell *v.* Pryor 257
Rosher, *re*, Rosher *v.* Rosher . 317
Rosier, Shackell *v.* 200
Ross *v.* Adcock 304
— *v.* Aldwick 281
— (Countess of), Bateman *v.* . 413
— Birmingham, Dudley and District Banking Co. *v.* . 269
— Doran *v.* . . . 82, 84, 138
Ross's Trust, *Re* 350
Rosse *v.* Ardwick 281
Rosse's Case 281
Rossell *v.* Rossell 94

PAGE
Rossiter, Britain *v.* 169
— *v.* Rossiter 614
Rostron, Bowman *v.* 194
Roswell, Bois *v.* 397
Roules, Yate *v.* 521
Rous *v.* Jackson 386
Rousillon *v.* Rousillon 574
Routledge *v.* Burrell 7
Rowbotham *v.* Wilson . . 49, 241
Rowcliffe, Wood *v.* 217
Rowden *v.* Maltster 308
Rowe, Calmady *v.* 145
Rowen, Massy *v.* 347
Rowntree *v.* Jacob 207
Roxburghe (Duchess of), Dunbar (Corporation of) *v.* 148
Royal Exchange Assurance Co., Blackett *v.* 132, 134
Royal Exchange Assurance Co., Cornfoot *v.* 163
Royal Exchange Assurance Co., Elliott *v.* 533
Royal Exchange Assurance Co., Pelly *v.* 134
Royal Exchange Assurance Corporation *v.* Sjorforsakrings Aktiebolaget Vega . . 502, 633
Royal Insurance Co., Isaacs *v.* . 172
Royden and Moulster's Case . 308
Roystone, Clarke *v.* 133
Royston Water Co., Titchmarsh *v.* 262, 263
Rubery *v.* Jervoise 501
Ruby *v.* Foot 457
Rucker *v.* London Assurance Co. 134
Rudall, Simmons *v.* 27
Rudge (or Rudg), Pincombe *v.* . 485
Ruffles *v.* Alston 413
Rugge, Clarke *v.* . . 262, 263, 265
Rumsey, Merrill *v.* 324
Rundell, Hume *v.* 77
Ruscarit, Waldron *v.* 223
Russell, Bedford *v.* . . 320, 375
— *v.* Ledsam 165
— *v.* Smythies 334
— *v.* Watts 266, 268, 271, 485
— Webb *v.* 486
Russen *v.* Coleby 527
Russian Steam Navigation Co. *v.* Silva 73
Rutland (Duke of), Mundy *v.* . 98
Rutland's (Countess of) Case . . 124
— (Earl of) Case . . 295
Rycroft, Metcalfe *v.* 7, 24
Ryle, Hardy *v.* 167
Rymer *v.* McIlroy 245

S.

Saalfeld, Perls *v.* 575
Sacheverell, Davie *v.* 561

PAGE
Sacheverell *v.* Porter . . . 251
Sackville-West *v.* Holmesdale . 609, 613, 615, 628
Sadler *v.* Leigh 162
Sadlier *v.* Biggs . . 144, 147
Sagar, Cort *v.* 218
Sailing Ship "Garston" Co. *v.* Hickie & Co. . . . 72
St. Albans *v.* Ellis 486
— (Duke of) *v.* Shore . 535
St. Aubyn, Humphreys *v.* . . 587
St. Cross Hospital, Att.-Gen. *v.* . 145
— Master and Brethren *v.* Howard de Walden (Lord) . . . 66
St. Helens Corporation, Taylor *v.* 77, 121
St. John, Biddulph *v.* . . 159
— *v.* Valencia . . . 313
St. John's Hospital, Att.-Gen. *v.* 145
— Marlborough *v.* . . 304
St. Leonards, Littleham *v.* . 31
St. Mary, Warwick, R. *v.* 160, 162
St. Paul, Covent Garden (Inhabitants) R. *v.* 6
St. Saviour's (Wardens of) *v.* Bostock 191
St. Vincent, Anderson *v.* . . 424
Sainter *v.* Ferguson 505, 506, 507, 572
Saintsbury, Whetstone (Lady) *v.* 366
Salisbury (Marquis of), Beaumont *v.* 46, 52, 371
— — *v.* G.N. Ry. Co. 234, 239
— Major *v.* 192
— Pigot *v.* 291
Salkeld, Milburn *v.* . . 48, 49
Saltash (Mayor of), Goodman *v.* 390
Salter *v.* Kidley 195
Saltern *v.* Saltern 357
Salton *v.* New Beeston Cycle Co. 154
Saltoun *v.* Houstoun . . 198, 490
Salway, King *v.* 145
Sammes' Case 287 289, 365, 393, 394
Samon *v.* Jones . . . 48
Sampayo *v.* Gould . . 627, 628
Sampson *v.* Easterby . . 198, 490
Samson, Clarke *v.* . . . 500
Samyne, Tudor *v.* . . 348, 349
Sanctuary, Godson *v.* . . 169
Sandeman *v.* Mackenzie 431, 439, 440, 441
Sanders *v.* Savile . . . 48
Sanderson *v.* Berwick (Mayor, &c. of) . . 554, 555
— *v.* McCullom . 32, 39, 41
— *v.* Symonds . 32, 39, 40
Sandilands, *Re* . . . 6, 7, 21
— Boughton *v.* . 180, 410
— Haukinson *v.* . . 513
Sandiman *v.* Breach . . . 231
PAGE
Sandwich (Earl of), Montague *v.* 608
Sandys, Campbell *v.* 354, 358, 449, 624
Sansom *v.* Bell 182
Sargent, *Ex parte* Tahiti Cotton Co., *Re* 35
— Proctor *v.* 572
— Turner *v.* . . 626, 627, 628
Sarl, Myers *v.* . . . 70, 71, 72
Satterthwaite, Seyton *v.* 393, 623
Saunders *v.* Boyd, Fitzgerald's Settled Estates, *Re* 435, 437
— Bustard *v.* . . 395
— *v.* Johnson . . . 517
— *v.* Milsome . 491, 500
— Wood *v.* 244
Saunders' Trusts, *Re* . . . 414
Saunderson *v.* Piper . . . 99
Saundeys *v.* Oliff . . 252, 254
Savage (Tertenants of), Adams *v.* 375
— *v.* Carroll . . . 438
— Hutchinson *v.* . . . 276
— Jeyes *v.* . . . 476, 479
— *v.* Lockyer . . . 344
Savile *v.* Drax, Drax, *Re* . . 454
— Sanders *v.* 48
— Stoddart *v.* . . 415, 416
Savill Bros., Ltd. *v.* Bethell 102, 119, 364, 383, 386
Saward *v.* Anstey . . . 547
Sawdon, Turner *v.* . . 487, 495
Sawtell, Hernando *v.* . . . 631
Sawyer, Warne *v.* 304
Say & Seal (Lord) *v.* Jones (Lady Catherine) 326
Say & Seal's (Lord) Case . . 86
Sayles, Dunn *v.* 495
Scammonden, R. *v.* . . . 203
Scaranke, Cotton *v.* . . . 400
Scarborough, Lumley *v.* . . 197
Scard, Fox *v.* 504
Scargill, Carter *v.* 536
Scarisbrick *v.* Skelmersdale . 433
Scarlett, Lucton School v. . . 147
Scarsdale *v.* Curzon . . . 620
Scavage *v.* Parker . . . 164, 166
Schell, Reindel *v.* 507
Schenck *v.* Legh . 475, 477, 478
Schmalz, Fenwick *v.* . . . 231
Scholefield *v.* Alexander . . 113
— *v.* Lockwood . . 196
Scholfield *v.* Spooner . . 604, 605
Schott Segner & Co., Badische Anilin und Soda Fabrik *v.* 574, 576
Schultz, Leidemann *v.* . . . 72
Schwarz, Hill *v.* 589
Schweder, Leech *v.* . . . 556
Schweppes, Ltd., Godwin *v.* 269, 270
Scobell, Wodehouse *v.* . . . 564
Scockwith, Michael *v.* . . . 41
Scot, R. *v.* 141, 148

PAGE
Scott *v.* Avery 533
— Cowper *v.* 458
— Drury *v.* 582
— Evans *v.* 460, 462
— Exton *v.* 15
— Fancy *v.* 246
— Hutchins *v.* . . . 30, 37
— Pilkington *v.* 572
— Shrewsbury *v.* 217
— *v.* Soans 177
— *v.* Steward 628
Scott-Chad, *Re*, Pares *Re*, Scott-Chad *v.* Pares . . 602, 603
Scottish Widows Fund *v.* Craig 454
Scovel *v.* Cabel . . 81, 121, 281
Scovell & Cavel's Case . 81, 121, 281
Scrimpshire, Ayloffe *v.* . 50, 510
Scrimshire, Ailoffe (or Ayliff) *v.* 50, 510
Scrope *v.* Offley 50
Scruton *v.* Snaith 113
Scudamore, Clements *v.* . . . 353
— Crossing *v.* . . . 48
— *v.* Vandenstene . 23, 24
Scully, Maguire *v.* . . 618, 619
Seabourne *v.* Powell . 566, 568, 579
Seabright, Hall *v.* 52
Seagood *v.* Hone . . 81, 309, 339
Seal *v.* Claridge 21
Seaman's Case . . . 81, 120
Sear, Davies *v.* 266
— *v.* House Property and Investment Society . . . 488
Searle, *Re*, Searle *v.* Baker . . 376
— Hopehill *v.* 94
— *v.* Law 54
— South *v.* 422
Sears, Akers *v.* 400
Searville *v.* Edwards 50
Seaton *v.* Henson 42
Seaward, Druitt *v.* 404
Sebright, Calvert *v.* . . 556, 562
Seddon, Aspden *v.* 258
— *v.* Senate . . 498, 561, 562
Sedgwick, Shurmur *v.* 204
Selby *v.* Chute 555
— *v.* Crystal Palace District Gas Co. 245
Seller, Holms *v.* . . . 49, 241
Sellin *v.* Price 32
Selwyn *v.* Selwyn 79
Sely, Richards *v.* 51
Senate, Seddon *v.* . 498, 561, 562
Senhouse *v.* Christian . . . 245
— Coltman (Colton or Coultman) *v.* . . . 48, 359
Senior *v.* Armitage. 133
Sepalino *v.* Twitty 14
Serff *v.* Acton Local Board . . 263
Servante *v.* James 519
Severn and Clerk's Case . . 489

PAGE
Sewell, Cole *v.* . 382, 385, 387, 388
Seybrooke *v.* Ball 164
Seymor's (Edward) Case . 307, 354
Seymour, Hinchinbroke (Lord) *v.* 458
Seyton, *Re*, Seyton *v.* Satterthwaite 393, 623
Shackell *v.* Rosier 200
Shafto *v.* Butler 349, 352
Shakespear, *Re* 348
Shand, Bowes *v.* 72
Shank, Douglas *v.* . . . 163, 164
Shannon, Davey *v.* 576
Sharington *v.* Stratton . . 205, 206
Sharp, Girland *v.* 366
— *v.* Hubbard 158
— *v.* Jackson 15
— *v.* Waterhouse 496
Sharpe, Maugham *v.* 179
Sharpley *v.* Mablethorpe (Overseers of) 148
Sharplus *v.* Hankinson . . . 83
Shaw, *Re*, Robinson *v.* Shaw 420, 421
— *v.* Hunt 179
— *v.* Stenton . . . 555, 556
Sheafe, Osman or Osmere *v.* . . 48
Shears *v.* Jacob 21
Shearwood, Hare *v.* 127
Sheddon, Carruthers *v.* . . . 179
Sheffield Corporation *v.* Sheffield Electric Light Co. . . 166, 169
Shelburne, Stapleton *v.* 530
Sheldon *v.* Dormer 453
— Gardner *v.* 373
Shelley *v.* Earsfield . . . 312, 339
— Sidney *v.* 64
Shelley's Case 303, 324 *et seq.*; 374, 393, 445, 616
Shelton *v.* Shelton 197
— *v.* Watson 614
Shelton's Case 11
Shepherd, Churchill *v.* 595
— Porter *v.* 523
Sheppard *v.* Gosnold . . 141, 148
Sherborne (Lord), Fry *v.* 475, 477, 479
Sherman, Coleman *v.* 515
Shewry *v.* Pigott 258
Shield, *Re* 54
Shillito, Barraclough *v.* 423
Shirley, Fisher *v.* 591
Shore, Balmain *v.* 479
— Patch *v.* 607
— St. Albans (Duke of) *v.* . . 535
— *v.* Wilson 59, 60, 61, 63, 141, 146
Shortridge *v.* Lamplugh . . . 374
Shove *v.* Pincke 49
Shrewsbury *v.* Gould . . . 494, 501
— (Earl), Howard *v.* . . 182, 184, 186, 189, 217
— *v.* Scott 217
— *v.* Shrewsbury . . . 453
Shrewsbury's (Earl of) Case . 91

PAGE
Shrimpton, Watts *v.* 634
Shropshire JJ., R. *v.* 169
Shulter's Case 4
Shurmur *v.* Sedgwick . . . 204
Shury *v.* Piggot 258
Sibley *v.* Ashforth, Ashforth *Re*. 387, 388
Sibthorp *v.* Brunel 528
Sibthorpe, Smith *v.* 396
Sicklemore *v.* Thistleton . 501, 542
Sickness and Accident Assurance Association, South Staffordshire Tramways Co. *v.* . . . 166
Siddons, Roe *v.* 255
Sidebotham *v.* Holland . . . 166
— *v.* Knott 277
Sidford, Wiltshire *v.* 240
Sidney, Clanrickard *v.* . . . 44, 565
— Demandant 226
— *v.* Shelley 64
Siggers *v.* Evans . . . 15, 19
Sikes, Belcher *v.* 84, 543
Silcock, Snell *v.* 340, 342
Silkstone and Dodworth Coal and Iron Co., Gartside *v.* . . . 10, 79
Silva, Russian Steam Navigation Co. *v.* 73
— Tilbury *v.* 237
Simkin, Moore *v.* 318
Simmonds, Knox *v.* 171
— *v.* Taylor 40
Simmons, Heseltine *v.* 130
— *v.* Rudall 27
Simonds, Buckley *v.* 361
Simons *v.* Johnson 192
Simonson, Blaunket *v.* . 80, 292, 302
Simpson, *Re*, Simpson *v.* Simpson 591
— Blesard *v.* 308
— Catton *v.* 38
— *v.* Dendy . 144, 145, 233, 238, 239
— *v.* Frew . 434, 441, 451
— *v.* Margitson . . 62, 78, 139, 156
— *v.* Simpson, Doe d. . 308
— *v.* — Simpson, *Re* 591
— Thompson *v.* . 618, 624
Sims, Coles *v.* 504
— *v.* Urry 94
Sinnet *v.* Walsh 450
Sion (Abbess of), R. *v.* 284
Sjoforsakrings Aktiebolaget Vega, Royal Exchange Assurance Corporation *v.* . . . 502, 633
Skelmersdale, Scarisbrick *v.* . 433
Skerne's Case 275
Skey, Fraser *v.* 499
Skidmore, Crossing *v.* 48
Skiplam (Inhabitants), R. *v.* . 171
Skipper *v.* King 479

PAGE
Skull *v.* Glenister 244
Slack, Cowlam *v.* 251
— Wood *v.* 40
Sladen *v.* Sladen 318
Slater, Mortimer *v.* 403
Sleigh *v.* Metham 48
Slingsby *v.* — 418
Slingsby's Case . 80, 83, 393, 397, 516, 517
Sloman *v.* Walter . 504, 506, 507
Small, Bankes *v.* 567
— Gibson *v.* 131
— Jeffereys *v.* 396
— Tasker *v.* 627
Smallbone, Keane *v.* 34
Smallbrooke, Holden *v.* . 302, 354
Smallman *v.* Powys . . 50, 359
Smeddle, Littledale *v.* . 87, 312
Smith, *Re*, Chapman *v.* Wood . 351
— Ackroyd *v.* 244
— Antrobus *v.* 54
— Atkinson *v.* . . . 204, 535
— *v.* Baker . . . 569, 580
— Baldwin *v.* 328
— Bank of Hindostan *v.* 37, 38
— *v.* Bole 164
— Bower *v.* . . . 588, 603
— Broke *v.* 27, 128
— Brookman *v.* 301
— *v.* Butcher 67
— *v.* Camelford 448
— *v.* Chadwick 78
— Chambers *v.* 169
— Chick *v.* 162
— *v.* Compton . . . 546, 552
— *v.* Dickenson 507
— Dormer *v.* 157
— *v.* Dudley 407
— Fisher *v.* 203
— *v.* Galloway . 215, 222, 226
— *v.* Gold Coast and Ashanti Explorers . . . 169
— *v.* Harwich (Mayor, &c., of) 493, 496
— Hosking *v.* 209
— *v.* Howden 237
— *v.* Jersey (Earl) . 58, 68, 125
— King *v.* 5, 209
— *v.* Lucas . . . 46, 586, 606
— Needham *v.* 607
— *v.* Oakes 393
— *v.* Osborne . . . 568, 580
— *d.* Dormer *v.* Packhurst . 47, 77, 83, 90, 92
— Parkhurst *v.* 47, 77, 83, 90, 92
— *v.* Partridge 462
— *v.* Pocklington . 499, 515
— Powell *v.* 103
— Pybus *v.* 351
— Ramsden *v.* . 492, 584, 585, 587

PAGE
Smith *v.* Risley . . 205, 206
— *v.* Sibthorpe, Jackson, *Re* 396
— *v.* Smith (5 Ir. C. R. 88) . 339
— *v.* Smith (12 Sim. 317) 402, 414
— *v.* Smith (2 Vern. 92) . . 460
— Stedman *v.* 246
— Wallis *v.* . . 505, 506
— *v.* Walton 152
— Whitbread *v.* 79
— *v.* Wilson (3 B. & Ad. 728) 59, 62, 72
— *v.* Wilson (8 East 437) . 532
— Young *v.* . 182, 184, 582, 585
Smith's Settlement, *Re* . . 416
Smith and Lane's Case . . . 205
Smy *v.* June 310, 314
Smye *v.* Chown . . 310, 314
Smyth, *Ex parte* 437
— Este *v.* 634
— Owen *v.* . . . 91, 316
— *v.* Wheeler 19
Smythies, Newson *v.* . . 528, 537
— Russell *v.* 334
Snaith, Scruton *v.* 113
Snape, Dennis *v.* 94
— *v.* Turton . . 53, 79
Snell *v.* Silcock . . . 340, 342
Snowe *v.* Cuttler 325
— Waker *v.* . . . 300, 329
Soans, Scott *v.* 177
Société Générale de Paris *v.* Tramways Union Co., Ltd. 35
— *v.* Walker . . . 35, 36
Solly *v.* Forbes 47, 77
Soper, Page *v.* 406
Sorsbie *v.* Park 516
South *v.* Searle 422
South African Breweries, Ltd. *v.* King 632
Southampton (Lord) *v.* Brown . 24
— *v.* Hertford (Marquis) 385
Southcot (Southcote or Southcott) *v.* Stowel (or Stowell) . 325, 375
Southcote *v.* Hoare 521
South Eastern Ry. Co., Rashleigh, *v.* 485, 496
— *v.* Warton 195, 196, 197
Southgate, Chaplain *v.* 560
— *v.* Chaplin . . . 560
South Kensington Hotel Co., Luke *v.* 19
South Metropolitan Cemetery Co. *v.* Eden 244
South Staffordshire Tramways Co. *v.* Sickness and Accident Assurance Association . . 166
Southwel *v.* Brown 6
Southwood, Locke *v.* 320

PAGE
Sowerby *v.* Fryer 304
Spark *v.* Spark 405
Spark's Trust, *Re*, Spark *v.* Massey 413
Sparkes, Hinton *v.* 506
Sparrow *v.* Paris 506
Spartali *v.* Benecke 136
Spearman, Trapp *v.* 38
Speed, Davies (or Davis) *v.* 319, 377
Spence, Brown *v.* 157
Spencer, Bagshaw *v.* . 328, 335, 427
— *v.* Boyes 568
— *v.* Clark 308
— *v.* Durant 517
— *v.* Godwin 93
— *v.* Marriott 557
— Pearson *v.* . 262, 263, 264
— *v.* Spencer 437
Spencer's Case 499
Spicer *v.* Cooper 72
— *v.* Lea 66, 152
— Vincent *v.* 121
— Webb *v.* 22
Spiers & Pond, Poussard *v.* . 536
Spirett *v.* Willows . . 347, 348
Spooner, Peacock *v.* 336
— Scholfield *v.* . 604, 605
Spoor *v.* Green 549
Spring *v.* Pride . . 351, 598
Sprot, Caledonian Ry. *v.* . . 258
Spurrier, Dann *v.* . . 103, 121
— *v.* La Cloche . 533, 631, 633
Spyve *v.* Topham . . 84, 283
Squire, Collier *v.* . . 406, 407
Stables, Blackburn *v.* . 612, 613
Stafford *v.* Buckley 308
— MacDonnogh *v.* . . . 177
Stagg, Wyatt *v.* 20
Stair (Earl), Murray *v.* . 16, 17
Staker, Styant *v.* 254
Stamford *v.* Hobart . . 612, 615
Stammers *v.* Dixon 145
Standard Bank of British South Africa *v.* Stokes 240
Standbridge, Lyndon *v.* . 228, 231
Standen *v.* Chrismas 500
Standerwick, Gawler *v.* . . . 461
Standing *v.* Bowring 15
Stanhope, Collingwood *v.* 432, 433, 435
Stanhope's Case 443
Stanley, Blundell *v.* 278
— *v.* Coulthurst 615
— *v.* Hayes 563
— *v.* Jackman . . 621, 622
— *v.* Leigh 620
Stannard *v.* Forbes . . 500, 551
Stanton *v.* Chamberlain . . . 12
Staple *v.* Heydon . . . 262, 265
— Mayor, &c. of Merchants, *v.* Bank of England, Governor & Co. . 11, 13

PAGE
Staples *v.* Maurice 392
Stapleton *v.* Shelburne . . 530
Stapleton's Case 53
Starkey, *Re*, Farquhar, *Ex parte* 169
— *v.* Starkey 613
Starling *v.* Prince 48
Staunton, Ashwell *v.* 184
Stavers *v.* Curling . . . 523, 539
Stedman *v.* Smith 240
Steeds *v.* Steeds 517
Steel Brothers, Ltd., Birland's Trustee *v.* 389
Steele *v.* Mart . . 173, 174, 175
— *v.* Mitchell 563
— Timmis *v.* . 81, 292, 296, 355
Steer, Adams *v.* 49
Stenton, Shaw *v.* 555, 556
Stephen's Case 445
Stephens, Copeland *v.* 18
— *v.* Frost . . 468, 473
Stephenson, *Re*, Brown, *Ex parte* 344
— Line *v.* . 117, 499, 500, 546, 552
Stevens, Abdy *v.* 121
— *v.* Lawton . . . 445
— *v.* Trevor Garrick . 346, 604, 606
— *v.* Van Voorst . . 586, 590
— and Agnew, R. *v.* . 171, 172
Stevenson, Hesse *v.* 552
— *v.* Powell 557
Stevinson's Case 489
Steward, Scott *v.* 628
— West *v.* 30
— Wolveridge *v.* . 484, 487
Stewart *v.* Merchants' Marine Insurance Co. . . 85
— Bros., Angier Bros. *v.* 160, 163
Stewkly *v.* Butler . 115, 225, 282
Stiles *v.* Attorney-General . . 202
Stint *v.* Morgan 233
Stirum *v.* Richards . . 434, 436
Stock *v.* Pope 223
Stoddart *v.* Savile . . 415, 416
Stogdon *v.* Lee . . 347, 349
Stoke *v.* Pope 223
Stokes, Heron *v.* . 446, 448, 449
— Hood *v.* 397
— Standard Bank of British South Africa *v.* . . 240
— *v.* Stokes 193
Stoke-upon-Trent (Inhabitants), R. *v.* 72
Stone *v.* Bale 175
— Gaisford *v.* 197
— *v.* Grubbam 173
— *v.* Van Heythuysen . . 491
Stonor's Trusts, *Re* . . 346, 604
Storer *v.* Gordon . . 24, 532, 539
Stork *v.* Fox 223
Storry *v.* Walsh 199

PAGE
Stourbridge Ry. Co., Wood *v.* . 245
Stowel (or Stowell), Southcot (Southcote or Southcott) *v.* . 325, 375
Strange *v.* Greenhill 95
Strangeways, Campbell *v.* . . 162
Stransham and Searles, Swan *v.* 499
Straphan, Carter *v.* . . 12, 37
Strata Mercella's, Abbot of, Case 142
Stratton *v.* Best 392
— Sharington *v.* . 205, 206
Streatfield *v.* Streatfield . . 613
Stretton, Nicholls *v.* . . . 574, 576
Strickland, Evers *v.* 180
— *v.* Maxwell . . . 85
— *v.* Williams . . 506
Stringfield, Pugh *v.* 519
Strong *v.* Kean, and Kean *v.* . 544, 545, 546
Stronge *v.* Hawkes 276
Stroud, *Re* 118
— Andrews *v.* 337
Stroughill *v.* Buck 196
Strutt, Galsworthy *v.* 506
Stuart, Ford *v.* 79
— Grey *v.* 582
Stukely *v.* Butler 115, 225, 226, 282
Sturgis *v.* Corp 348
Styant *v.* Staker 254
Style *v.* Hearing 499
Styles *v.* Wardle . . . 8, 176
Styward, Petty *v.* 396
Suffield *v.* Brown . . 264, 265
Suffield, London Freehold and Leasehold Property Co. *v.* . . 17
Suffell *v.* Bank of England 39, 40
Sugg, Wheadon *v.* 289
Summers, Bottrell *v.* . . 192, 207
Summersett, Pearsall *v.* . . 191
Sumner v. Powell 513
Sunderland Marine Insurance Co. *v.* Kearney 24
Surman *v.* Fitzgerald, Fitzgerald, *Re* . . 345, 633, 634
— *v.* Wharton 347
Surrey *v.* Piggot 258
Surtees *v.* Surtees 618
Sury *v.* Brown 112
— *v.* Cole 112
— *v.* Pigot 258
Sury's Case 80
Susanni's Trusts, *Re* . . 449, 450
Sussex, Leonard *v.* . . . 613, 615
— (Earl of) *v.* Temple 314, 392, 426, 446
Sutherland (Duke of) *v.* Heathcote 241, 247
Sutton and Dowse's Case . . 281
— Southcoates and Drypool Gas Co., Jordeson *v.* . 259
Sutton's Hospital, Case of . . 384

PAGE
Swain *v.* Ayres 52
— *v.* Morland 161
Swaine *v.* Holman 19
Swallow *v.* Binns . . . 476, 481
Swan, *Ex parte* 36
— Goldshede *v.* . . . 62, 64
— *v.* North British Australasian Co., Ltd. 36
— *v.* Stransham and Searles . 499
Swansborough *v.* Coventry 266, 271
Swansea (Mayor, &c., of), Beaufort (Duke of) *v.* . . 143, 145
Sweetapple *v.* Horlock . . 589
Swetnam, Porter *v.* 486
Swiney *v.* Barry 37
Swinford & Horn, *Re* . . . 156
Swinnerton, Butler *v.* . . . 557
Swift, Ingleby *v.* 182
— *v.* Swift 624
Swyer, R. *v.* 154
Swyft *v.* Eyres . . . 222, 384
Syderstone (Inhabitants), R. *v.* . 162
Sydney (City of, Commissioners), Lord *v.* 237
Syers *v.* Jonas 135
Symes *v.* Symes 388, 389
Symond's Case 315
Symonds *v.* Lloyd 72
— Sanderson *v.* . . 32, 39, 40
— *v.* Wilkes 621
Symons, Buckler *v.* 361
— Harrison *v.* 423
— *v.* Low 161

T.

Taaffe *v.* Conmee 397
Tagart, Davies *v.* 491
Tagert, Kingdon *v.* 630
Taggart *v.* Taggart . . . 395, 618
Tahiti Cotton Co., *Re*, Sargent, *Ex parte* 35
Tailby *v.* Official Receiver . 508, 509
Tait *v.* Lathbury 626
Talbot, Chandos (Duke of) *v.* . 464
— Great Western Ry. *v.* . 244
Talisker Distillery, Hamlyn *v.* . 633
Tallis *v.* Tallis 573
Tankard, Whaley *v.* 206
Tannar, Cohen *v.* 563
Tanner *v.* Byne 203
— *v.* Dorvell . . . 378, 448
Tapner *d.* Peckham *v.* Merlott . 319, 338
Targus *v.* Puget 87
Tasker *v.* Small 627
Tatham, Hutchinson *v.* . . . 134
— *v.* Vernon . . . 330, 423
Tatton *v.* Mollineux 335
Tatum *v.* Catomore 26
Taunton *v.* Pepler 5
Taw *v.* Bury 11
Tawney *v.* Ward 582
Taws *v.* Knowles 264
Tayler, Gossage *v.* 323
— *v.* Great Indian Peninsula Ry. Co. . . 36
— *v.* Webb 94
Tayleur *v.* Dickenson 580
— Humphrey *v.* 393
Tayloe, Holder *v.* 486
Taylor, Allen *v.* . . 266, 268, 271
— Austen *v.* 330, 610
— Bond *v.* 412
— Bony *v.* 310, 329
— Bowman *v.* 194
— Browne *v.* 54
— *v.* Caldwell 130
— Chambers *v.* . 300, 310, 322, 328, 340, 342
— Courtney *v.* . 198, 199, 484, 491
— *v.* Dabar (or Debar) . 566, 579
— Derby (Earl of) *v.* . . . 293
— Dutton *v.* . . . 262, 265
— Holder *v.* 499, 500
— *d.* Atkyns *v.* Horde . 79
— Lilly *v.* 309
— *v.* London and County Banking Co. . . 273, 278
— *v.* Parry 224
— *v.* St. Helens (Corporation) . . . 77, 121
— Simmonds *v.* 40
— *v.* Thorpe 94
— *v.* Vale 50
Teague's Settlement, *Re* . . 386
Teasdale *v.* Braithwaite . . 204
Tebb *v.* Cave 555
Tebbe *v.* Popplewell 48
Tedlie, Hunter *v.* 403, 404
Teebay *v.* Manchester, &c. Ry. Co. 127
Telegraph Despatch and Intelligence Co. *v.* McLean . . 495
Telling, Whatley *v.* 173
Temple, Matthews *v.* . 314, 392, 426, 446
— Sussex (Earl of) *v.* . 314, 392, 426, 446
Tenant, Parker *v.* 11
Tennison *v.* Moore . . 433, 437
Terry, Dixon *v.* 170
— *v.* Duntze 527
Testar, Horsfall *v.* 541
Tetherington, Miller *v.* . . . 134
Tetherton, Loggin *v.* 94
Tewkesbury (Bailiffs, &c. of) *v.* Bricknell 147
Texira *v.* Evans 35

PAGE
Teynham *v.* Webb . 435, 441, 449, 454, 464, 466, 478
Thackeray *v.* Wood . . . 553
Thames Haven Dock Co. *v.* Brymer 531
Theebridge *v.* Kilburne . . 335
Theed's Settlement Trust, *Re* . 440, 472
Thellusson *v.* Liddard . . 247, 274
— *v.* Rendlesham . 67
Thettenwell *v.* Bunney . . . 304
Thiis *v.* Byers 163
Thistleton, Sicklemore *v.* . 501, 542
Thomas, Basset *v.* 52
— *v.* Cadwallader 486, 488, 539
— Courtail *v.* 31
— Davies *v.* 270
— *v.* Desanges . . . 162
— Ellison *v.* . 433, 434, 435
— Morgan *v.* . . . 421
— Mucklestone *v.* . 486, 488
— *v.* Owen . . 267, 268
— *v.* Popham . . 155, 163
Thomlinson *v.* Dighton . . . 53
Thompson *v.* Attfield . . 47
— *v.* Butcher . . 27, 128
— *v.* Brown . . . 532
— Byrom *v.* . . 34, 39
— *v.* Fisher . . . 614
— *v.* Hakewell . . . 518
— *v.* Leach . . 14, 19
— *v.* Simpson . . 618, 624
— *v.* Webster . 129, 203
Thomson *v.* Davenport . . . 136
— *v.* Waterlow . 260, 261
Thornborough *v.* Monpenson . 567
Thornburgh, White *v.* . . 327
Thorne, Healy *v.* 145
— *v.* Thorne . . 48, 206
Thornley *v.* Thornley . . . 395
Thornton, Anderson *v.* . . 191
— *v.* Bright . . . 582
— Perkins *v.* . . . 630
Thoroughgood *v.* Turner . . 4
Thoroughgood's Case, 2 Rep. 9a . 4
— 9 Rep. 136a 11, 17
Thorp, Allen *v.* 406
— *v.* Owen 318
— *v.* Thorp . . 525, 530, 531
Thorpe *v.* Brumfitt . . . 244
— Taylor *v.* 94
— *v.* Thorpe . . 192, 318
Throckmerton (or Throgmorton) *v.* Tracey (or Tracy) . 43, 46, 75, 280, 284, 286, 292, 294
Throgmorton *d.* Robinson *v.* Warrey 323
Thrustout *d.* Levick *v.* Coppin . 274
— *d.* Gower *v.* Cunningham 320

PAGE
Thurlston, Wythe *v.* . 416, 422
Thurman *v.* Cooper . . 79, 293
Thwaites, Lambert *v.* . 447, 448, 449, 450, 451
Tidmarsh *v.* Grover . . . 38
Tilbury *v.* Silva 237
Tilsed, Chad *v.* . . 143, 144, 145
Timmis *v.* Steele . 81, 292, 296, 355
Tippet *v.* Hawkey . . . 519
Tippin (or Tipping) *v.* Cosin (Cosins, Coson or Cozens) . 323, 325, 366, 375
Tipping *v.* Howard . . . 409
— *v.* Piggot (or Pigott) 319, 377
Tipping's (Sir Thomas) Case 319, 377
Tippins *v.* Coates . . . 514
Tisdale *v.* Essex . . . 51, 561
Titchmarsh *v.* Royston Water Co. 262, 263
Titherington, Mercantile Marine Insurance Co. *v.* . . 163
Titherton, Loggins *v.* . . . 94
Titus *v.* Preston (The Lady) . . 158
Todd, Brand *v.* . . 101, 103, 123
Todhunter, Pott *v.* 203
Toker, Townend *v.* . . . 202
Tollemache, Davis *v.* . 564, 566
Tomkies, Lloyd *v.* . . . 561
Tomkyns, Pougett *v.* . . . 177
Tomlinson *v.* Bullock . . . 161
— *v.* Dighton . . . 53
Tommas, Marler *v.* . . . 199
Tomson *v.* Butcher . . 27, 128
Topham, Spyve *v.* . . 84, 283
Topp, Ellen *v.* 536
Topping *v.* Howard . . . 409
Torball, Herbert *v.* . . . 160
Torres *v.* Franco . . . 481
Totherden, Higgens *v.* . . . 94
Tovy, Fielder *v.* 95
Townend *v.* Toker 202
Town Properties Investment Corporation, Davis *v.* . . . 555
Townsend's Case 353
Townshend *v.* Harrowby 585, 588, 601
Tracey (or Tracy), Throgmorton *v.* 43, 46, 75, 280, 284, 286, 292, 294
Trafford *v.* Ashton . . . 453
— Manchester College *v.* . 120
— Muller *v.* . . . 390
Trainor *v.* Phoenix Fire Assurance Co. 533
Tramways Union Co., Ltd., Société Générale de Paris *v.* . 35
Tranmarr (or Tranmer), Roe *d.* Wilkinson *v.* . . . 48, 383
Trapp *v.* Spearman . . . 38
Trapp's Case 226
Trappes, Tunstall *v.* . . . 91
Travers *v.* Travers . . . 582
Treasury Solicitor, Vaucher *v.* . 419

PAGE
Trecothick, Coles *v.* 21
Tredwell, Dawes *v.* . 182, 184, 198, 489, 492, 585, 587
Tredwen *v.* Holman 533
Treffry, Meredith *v.* 429
Tregusan, Wells *v.* 83
Treharne, Baillie *v.* 606
Treloar *v.* Bigge 488
Tremere, Lainson *v.* . 126, 194
Trenchard *v.* Hoskins . 76, 552
Trethewy *v.* Ellesdon 86
Trevanion, Walsh *v.* . 182, 185, 188
Trevelyan *v.* Trevelyan 385
Trevivan *v.* Lawrence . 194, 195
Trevor *v.* Trevor 327, 613, 616, 619
Trevor-Garrick, Stevens *v.* . 346, 604, 605
Trew *v.* Burton 40
Trickett *v.* Gillot . . 313, 314
Trig, Day *v.* 231
Tringham's Trusts, *Re*, Tringham *v.* Greenhill 332
Trinidad Asphalte Co. *v.* Amsard 259
— *v.* Coryat . 195, 196
Trollope, Dubber *v.* 310
Trowel *v.* Castle 26
Truefitt, Cowen *v.* . . 226, 227
Trueman *v.* Loder 136
Tubb, Harris *v.* 204
Tucker, *Re*, Tucker *v.* Tucker . 454
— Finch *v.* 357
— *v.* Harris 475
— *v.* Linger . . 64, 72, 78
Tuddingham, Warde *v.* . . . 205
Tudor *v.* Samyne . . 348, 349
Tulk *v.* Moxhay 390
Tullet *v.* Linfield 157
Tullett *v.* Armstrong . . 345, 349, 350, 352
Tunbridge Wells (Mayor, &c.) *v.* Baird 236
Tunstall *v.* Brachen 461
— *v.* Trappes 91
Tupper *v.* Foulkes . 5, 8, 11, 12
Turcan, *Re* 509, 605
Turner, Att.-Gen. *v.* 123
— *v.* Barlow . . 157, 159
— Born *v.* 269
— *v.* Evans 572
— *v.* Goodwin 530
— Millar *v.* 417
— *v.* Moon 549
— *v.* Sargent . . 626, 627, 628
— *v.* Sawdon . . 487, 495
— Thoroughgood *v.* . . . 4
— *v.* Turner 193
— *v.* Wardle . . 488, 491
Turner's (Sir Edward) Case 348, 349
Turnman *v.* Cooper . . 79, 293
Turpine *v.* Forreyner 231
Turrill, Clifford *v.* . 201, 202, 203
Tursaker *v.* Robinson . . 568
Turtle, Wroughton *v.* 113
Turton, Neale *v.* 511
— Snape *v.* 53, 79
Tuthill, Hobbs *v.* 425
Twaddle *v.* Murphy 283
Tweedie *v.* Maunder, Megret, *Re* 634
Twigg, Abraham *v.* 306
Twitty, Sepalino *v.* 14
Tyber, Greenwood *v.* 289
Tyler *v.* Fisher and Greenwood . 289, 445
— Greenwood *v.* 289
— *v.* Lake . . 346, 347, 348
Tyndall, Colmore *v.* . . 45, 372
— Whyte *v.* . . 512, 513
Tyrell, Hanbury *v.* . . . 85, 89
Tyrrell *v.* Hope 129
Tyrrel's Case 367
Tyrringham's Case 251
Tytherton, Biggins *v.* 94

U.

Ubley, Daniel *v.* 52
— Danyel *v.* 53
Ughtred's Case 525
Underhay *v.* Underhay . . . 294
Underhill *v.* Horwood . . . 19
Underwood and Son, Ltd. *v.* Barker . . . 573, 576
Union Lighterage Co. *v.* London Graving Dock Co. . . 256, 264
United Land Co. *v.* Great Eastern Ry. Co. 244
Uply, Daniel *v.* 52
Upton, Briggs *v.* 409
— *v.* Brown . 376, 402, 403, 415
— Daniel *v.* 52
— *v.* Upton 192
Urlwin, Law *v.* 52
Urry, Sims *v.* 94
Utty Dale's Case 281
Uvedale *v.* Halfpenny . . . 90

V.

Vaghan, Durchin *v.* 95
Vale, Taylor *v.* 50
Valencia, St. John *v.* 313
Vallier, Rigden *v.* . 48, 396, 397
Vandenstene, Scudamore *v.* . 23, 24
Vanderzee *v.* Aclom . . 447, 466
Van Grutten *v.* Digby . . . 634
— *v.* Foxwell . . . 324
Van Heythuysen, Stone *v.* . . . 491
Van Moses, Dutch West India Co. *v.* 179

PAGE
Van Voorst, Stevens *v.* . . 586, 590
Vardill, Birtwistle *v.* . . . 419
Vardon's Trusts, *Re* . . . 606
Varlo, R. *v.* . . 143, 144, 146
Vaucher *v.* Treasury Solicitor, Grove, *Re* 419
Vaughan, Burching *v.* . . 93
— Cabell *v.* 6
— Evans *v.* . 45, 557, 562
— Pemberton *v.* . . . 572
Vawdry, Vernon *v.* . . . 488
Vawser, Brown *v.* 3
Venables *v.* Morris . 325, 326, 369, 370
Veners *v.* Abbot of Fesch . . 289
Verney *v.* Verney . . . 462
Vernon *v.* Alsop 92
— *v.* Gatacre . . . 86
— *v.* Onslow 94
— Tatham *v.* . . 330, 423
— *v.* Vawdry . . . 488
— *v.* West 164
— *v.* Wright 321
Vernon's Case 203
Vernon and Vyse, Conolly *v.* 214, 215, 219
Vesey, Cooper *v.* 22
Viant's Settlement Trusts, *Re* . 594, 596
Vicars Choral de Litchfield *v.* Ayres 222
Viditz *v.* O'Hagan . . 586, 635
Villars (or Villers) *v.* Beamont . 203, 373
Villars, Cannon *v.* . . 64, 243
Vincent, Maugham *v.* . . . 414
— *v.* Spicer . . . 121
Viney *v.* Bignold 533
Vinkeston *v.* Ebden . . . 224
Voice, Papillon *v.* . . 327, 613
Vouillon, Gibbons *v.* . . . 510
Vyvyan *v.* Arthur 486

W.

W——, Grenclife (Executors of) *v.* 559
Wackerbarth, Mollett *v.* . . 38
Waddington, Robinson *v.* . . 168
Wadham, Heard *v.* . . . 531
Wadley *v.* Bayliss . . 141, 147
Wagner, Dakins *v.* . . . 171
Wainwright, Watts *v.* . . 382
Wait, Jones *v.* 223
— Nielsen *v.* 163
Waite *v.* Jones 200
— *v.* Morland . . . 413
Wakefeild, Goodgaine *v.* . . 164
Wakefield *v.* Brown . . . 521
— *v.* Maffet . . . 477
PAGE
Wakefield *v.* Richardson . . 437
Wakeford, Wright *v.* . . . 5, 22
Waker *v.* Snowe . . . 300, 329
Walcott *v.* Bloomfield . . . 441
Walden *v.* Holman, and Holman *v.* 177
Waldron *v.* Roscarriot (or Ruscarit) 223
Wales, Leighton *v.* . . 506, 572
Waley, *Re* 230
Walford, Bond *v.* . . . 19, 412
Walker, Durham and Sunderland Ry. Co. *v.* . 242, 245, 247
— Bickerton *v.* . . . 208
— *v.* Crawshay, Crawshay, *Re* 605
— *v.* Giles 82
— *v.* Hall 47
— *v.* Harris 527
— *v.* Hunter 62
— Leeds and County Bank *v.* 39
— Rawlings *v.* 384
— Robinson *v.* 513
— Société Générale de Paris *v.* 35, 36
— *v.* Walker 485
— *v.* Ware Ry. Co. . . 18
— and Others and Shaw, Son & Co., Arbitration between, *Re.* 135
Wall *v.* Byrne 356
— *v.* Wright . . . 87, 312
Wallace, Exel *v.* 340
Waller, Bacon *v.* 164
— Crouch *v.* . . 413, 414
Wallis *v.* Bendy, Bendy, *Re* 588, 600
— *v.* Day 574
— Freestone *v.* . . . 387
— *v.* Littell 18
— *v.* Smith . . . 505, 506
Walmesley, Clifton *v.* . . 139
— Mellor *v.* . 221, 240
Walpole *v.* Conway . . . 448
Walsh, Gardner *v.* 38
— *v.* Lonsdale . . . 52
— Sinnet *v.* 450
— Storry *v.* 199
— *v.* Trevanion . 182, 185, 188
Walshe, Frosett *v.* . . . 18
Walsingham's Case . . . 354
Walter, Kingsbury *v.* . . 442
— *v.* Parrott, Parrott, *Re* . 621
— *v.* Piggot (or Pigot) . . 93
— Sloman *v.* . . 504, 506, 507
Walters, Hunter *v.* . . 5, 208
Walthall, Boydell *v.* . . . 360
Walton, Fothergill *v.* . . 539
— Smith *v.* 152
Wandesforde *v.* Carrick . . 437
Warburton *v.* Warburton . . 453
Ward, *Ex parte*, Weibking, *Re* . 510
— Berridge *v.* . . . 233

PAGE
Ward *v.* Bradley 336
— *v.* Byrne 576, 577
— Dormer *v.* 412
— *v.* Dyas 377
— Fort *v.* 254
— *v.* Lambert 205
— Lawton *v.* 244
— (Lord) *v.* Lumley . . 31
— *v.* National Bank of New Zealand 19
— North Stafford Steel, &c. Co. *v.* 116
— Tawney *v.* 582
— *v.* Ward (L. R. 6 Ch. 789) . 393
— *v.* — (14 Ch. D. 506) . . 395
Warde, Bristow *v.* . . . 615, 623
— Offly *v.* 23
— *v.* Tuddingham . . . 205
— *v.* Warde 501
Wardle *v.* Brocklehurst . . 258
— Styles *v.* 8, 176
— Turner *v.* . . . 488, 491
Ware, *Re*, Cumberlege *v.* Cumberlege-Ware 601
— Ry. Co., Walker *v.* . . . 18
Waring *v.* Coventry 387
Warn *v.* Bickford 567
Warne *v.* Sawyer 304
Warren *v.* Arthur 540
— *v.* Fearnside 164
— Hutton *v.* . . . 131, 133
— *v.* Johnson 445
Warren's Trusts, *Re* . . 424, 426
Warrick *v.* Warrick 310
Warriner *v.* Rogers 54
Warrington, Lyburn v. . . 27, 128
Warton, S.E. Ry. *v.* 195, 196, 197
Warwick *v.* Gerrard 206
Wastneys *v.* Chappell . 357, 358
Waterhouse, Sharp *v.* . . . 496
Waterhouse and Presbye, Chandflower *v.* 561
Waterlow, Thomson *v.* . 260, 261
Waterpark *v.* Fennell 143, 145, 146
Waters, Williams *v.* 348, 360, 369
Waterworth, Ripley *v.* . 354, 355, 376
Watkeys *v.* De Lancey . . . 561
Watkins, Alpass *v.* . . 314, 327
— *v.* Nash 16
Watney, Willis *v.* 219
Wats *v.* Dix 48, 164
Watson, Feversham *v.* 531
— *v.* Gray 240
— Keightley *v.* . . 516, 520
— *v.* Pears 164
— Shelton *v.* 614
Watt *v.* Grove 204
— *v.* Watt 401
Watton, Bayntun *v.* 164
Watts *v.* Dix 48, 164

PAGE
Watts *v.* Kelson 244, 256, 258, 260, 261, 265, 268
— *v.* Ognell 365
— Pearce *v.* 98
— Perry *v.* 49
— Reeves *v.* 179
— Russell *v.* 266, 268, 271, 485
— *v.* Shrimpton 634
— *v.* Wainwright 382
Waugh, *Re*, Waugh *v.* Cripps . . 312
— *v.* Bussell . . . 39, 88
Way, Gibson *v.* 605
Way's Trusts, *Re* 15
Weatherall, Levin *v.* 379
Webb *v.* Dixon 103, 121
— *v.* Fairmaner 167
— *v.* Plummer 121, 133, 494, 501
— *v.* Russell 486
— *v.* Spicer 22
— Tayler *v.* 94
— Teynham *v.* 435, 441, 449, 454, 464, 466, 478
— *v.* Webb 335, 336
Webb's Trusts, *Re* 582
Webber's Settlement, *Re* . 80, 400, 403
Webster, Johnson *v.* 273
— Norton *v.* . 126, 139, 253
— Rimmer *v.* 209
— Thompson *v.* . 129, 203
Weeks *v.* Maillardet . 30, 32, 36
Weibking, *Re*, Ward, *Ex parte* . 510
Weir, Houlder *v.* 160
Weld *v.* Hornby 143
Weldon, Astley *v.* 507
Wellington, Poulson *v.* . 53, 199
Wellman *v.* Bowring 407
Wells *v.* Tregusan 83
— *v.* Wright 92
Welsh, Fowle *v.* 501, 562
Welstead, *Re*, Welstead *v.* Leeds 603
Welsted, Packer *v.* . 262, 263, 264
Wentworth, Garnish *v.* . . . 205
Were *v.* Cole 49
West *v.* Errissey . 381, 616, 619, 629
— Freeman *d.* Vernon *v.* . 164
— Grose *v.* 239
— Kidder *v.* 44
— *v.* Steward 30
— *v.* Williams 345
Westby *v.* Featherstone . 310, 312
West Metropolitan Ry., Goldsmiths' Co. *v.* . . 166, 168
Westminster Brymbo Coal Co., Wheatley *v.* 497
Westminster Corporation, L. & N. W. Ry. Co. *v.* 236
Westmoreland (Earl of), Lowther *v.* 328
West Mostyn Coal and Iron Co., Mostyn *v.* 499

PAGE
Weston, *Re*, Davies *v.* Tagart . 491
— *v.* Arnold . . . 240
— *v.* Burtenshaw . 84, 109, 322
— *v.* Metropolitan District Asylum (Managers) 504
West Riding JJ., R. *v.* . . . 169
Wetheread, Bryan *v.* 252
Wethered's Case 157
Wetherell, Nayler *v.* 447
Whaley *v.* Tankard 206
Wharrey, Robinson *v.* 323
Wharton, Surman *v.* 347
Whateley *v.* Kemp 614
Whatford *v.* Moore . . 476, 479
Whatley *v.* Telling 173
Wheadon *v.* Sugg 289
Wheate, Burgess *v.* 330
— *v.* Hall 625, 626
Wheatley *v.* Westminster Brymbo Coal Co. 497
— Wright *v.* 159
Wheeldon *v.* Burrows 256, 264, 265, 268, 271
Wheeler *v.* Addams 402
— *v.* Duke . . . 309, 428
— Keele *v.* 27
— Smyth *v.* 19
Whelpdale's Case 11
Whetstone (Lady) *v.* Saintsbury . 366
Whetton, Mathews *v.* 79
Whiddon's Case 17
Whieldon, Gordon *v.* 395
— McCarogher *v.* . . . 607
Whinray, North Western Ry. Co. *v.* 191
Whishaw, Meyrick *v.* . . . 379
Whiskins *v.* Davie 353
Whisson, Aveline *v.* 5
Whistler's Case 123, 250
Whiston's Settlement, *re*, Lovatt *v.* Williamson 331
Whitaker, *Re*, Christian *v.* Whitaker . . . 346, 604
— Lea *v.* 506
Whitbread, Janes *v.* 179
— *v.* Smith 79
Whitby, *Ex parte* 169
— *v.* Mitchell . . . 384, 386
Whitcombe, Pope *v.* 228
White, Baker *v.* 369
— Barnard *v.* 634
— *v.* Bass 265
— *v.* Beeton 536
— *v.* Briggs . . . 587, 615
— *v.* Carter 611, 613
— *v.* Collins 310
— Deffell *v.* 21
— *v.* Ewer 561
— Graves *v.* 489
— *v.* Hunt 232
— Hunt *v.* 563

PAGE
White, *v.* James 454
— Kerslake *v.* 252
— *v.* Osborne 188
— *v.* Thornburgh 327
— *v.* Tyndall . . 512, 513
— and Hindle's Contract, *Re* 326, 327
White's Charities, *Re*, Charity Commissioners *v.* London Corporation 236, 238
Whites *v.* Farmor 223
Whitgreave *v.* Whitgreave . . 583
Whiting's Settlement, *Re*, Whiting *v.* De Rutzen 412
Whitley, Leman *v.* 126
Whitlock *v.* Chartwell 51
— *v.* Horton 51
Whitmarsh, Deverell *v.* 207
Whitmore, Brough *v.* . . . 134
Whitmore *v.* Mason 345
Whitney, Lilley *v.* 294
— Union, Moon *v.* . . . 136
Whittaker *v.* Howe 572
Whitty, *Re* 35
Whyddon's Case 317
Wichelhaus, Raffles *v.* 65
Wickens *v.* Evans 572
Wicker *v.* Norris 171
Wickham *v.* Bath (Marquis) . 21
— Graham *v.* 607
— *v.* Hawker 247
— Xenos *v.* 8, 11, 13, 14, 15, 20, 21
Wicks, Fisher *v.* . . . 77, 397
Wienholt, Logan *v.* . . 504, 505
Wigg (or Wiggs), Fisher *v.* 77, 397
Wigglesworth *v.* Dallison 66, 73, 133 137
Wigson *v.* Garret . . . 54, 79
Wilcock *v.* Hewson 17
Wilcocks, Green *v.* 170
Wilder *v.* Pigott 606
Wilford, Morris *v.* 193
Wilkes, Espley *v.* 240
— *v.* Greenway 263
— *v.* Leuson 365
— Nandick (or Nandike) *v.* 504, 616
— Symonds *v.* 621
Wilkins *v.* Daure 282
— *v.* Kemeys 52
— *v.* Wood 133
Wilkinson *v.* Anglo-Californian Gold Mining Co. . 20
— *v.* Gaston 165
— *v.* Johnson, Johnson and Dibb 344
— *v.* Malin 222
— *v.* Tranmer (or Tranmarr) 48
Willan, Chester *v.* . . . 47, 49

PAGE
Willan *v.* Willan 204
Willand, Chester *v.* . . 47, 49
William Robinson & Co. *v.* Heuer . . . 574, 576
Williams, *Re* 477
— *v.* Ashton . . . 27
— *v.* Bayley . . . 200
— Bolton (Duke of) *v.* . 79
— Bradford *v.* . . . 535
— Broomfield *v.* . . 270
— *v.* Bryant . . . 179
— *v.* Burgess . . . 168
— *v.* Burrell . . . 498
— *v.* Carter . . . 626
— Davies and Williams *v.* 120, 232
— *v.* Green . . . 17
— *v.* Hathaway . 85, 501
— *v.* James . . . 244
— *v.* Jekyl 352, 354, 425, 427
— *v.* Jones . . . 130
— Jones *v.* 48
— *v.* Knight, Hodson, *Re* 606
— Knill *v.* . . 37, 38
— *v.* Mercier . 594, 595, 597
— *v.* Morgan . . . 126
— *v.* Nash . . . 165
— *v.* Phillips . . . 252
— *v.* Pinckney . . 275
— Prytherch *v.* . . 439
— Strickland *v.* . . 506
— *v.* Waters . 348, 360, 369
— West *v.* . . . 345
— *v.* Williams (3 Beav. 547) . 633
— — (12 East 209) . 314
— — (2 Swanst. 253) . 571
Williamson *v.* Butterfield . . 580
— Chetham *v.* . . 241
— *v.* Codrington . . 485
— Gale *v.* . . 79, 203
— Lovatt *v.* . . . 331
— Roots *v.* . . . 40
Willingale *v.* Maitland . . 390
Willion *v.* Berkley . 118, 122, 302
Willis *v.* Black 607
— Gorman *v.* . . . 10
— *v.* Jermin . . . 9, 10
— *v.* Martin . 91, 315, 448
— Randall *v.* . . . 629
— *v.* Watney . . . 219
— *v.* Willis . . 474, 477
— and Jermine's Case . 9, 10
Willon, Chester *v.* . . . 47, 49,
Willoughby *v.* Foster . . 220
— *v.* Middleton 184, 585, 586, 600
Willows, Spirett *v.* . 347, 348
Wills, *Ex parte* 567
PAGE
Wills *v.* Palmer 109, 322, 325, 375
Willson *v.* Love 506
Wilmer *v.* Curry . . . 513
Wilmot, Derby Canal Co. *v.* 9, 10, 11
— Hardwicke *v.* . . 583, 586
Wilmott's Trusts, *Re* 476, 478, 479
Wilshere, Haydon *v.* . . . 422
Wilson *v.* Armorer . . . 284
— *v.* Atkinson . . 415, 416
— *v.* Atter, Allen, *Re* . . 443
— *v.* Braddyll . . 50, 510
— Chester *v.* . . 47, 49
— Devine *v.* 103
— *v.* Duguid . . 449, 450
— Foord *v.* . . 544, 551
— *v.* Greenwood . . 344
— Harding *v.* . . . 240
— *v.* Keating . . . 208
— *v.* Mackreth . . . 241
— Mallott *v.* . . 3, 15, 20
— *v.* Paul 376
— *v.* Piggott . . 53, 199
— *v.* Pilkington . . . 408
— *v.* Queen's Club . . 269
— Rich *v.* 460
— Richardson *v.* . . 59
— Rowbotham *v.* . . 49, 241
— Shore *v.* . . 59, 60, 61, 63, 141, 146
— Smith *v.* . 59, 62, 72, 532
— *v.* Wilson . . . 85
Wiltes' Peerage Case . . 306, 307
Wilton *v.* Colvin . . . 593
Wiltshire *v.* Sidford . . . 240
Winchcombe *v.* Pigot. . 5, 28, 39
Winckfeild, Hall *v.* . . . 22
Windham *v.* Graham . . . 439
— *v.* Windham . . 222, 226
Windham's (Justice) Case . 120, 393, 395
Windsmore *v.* Hobart . . 288, 289
Windsor, Hart *v.* . . . 499
Windus, Hough *v.* 65
Wing *v.* Earle 66
Wingfield *v.* Wingfield . . . 334
Wingrave *v.* Palgrave . . 479
Winn *v.* Fenwick 451
Winnington, Domvile *v.* . . 441
Winscombe *v.* Piggott . 5, 28, 39
Winstanley, Blankley *v.* . . 147
Winston *v.* Linn 537
Winter *v.* Anson (Lord) . . 208
— *v.* Perratt 318
Wise, Harrington *v.* . . . 51
— *v.* Piper 626
Wiseman's Case 205
Wishart *v.* Wyllie 234
Withers *v.* Algood . . 328, 335
— *v.* Bircham . . . 519
Withes *v.* Casson . . . 193
Withnell *v.* Gartham . . 145, 146

PAGE
Withrington, Levett *v.* . . . 563
Withy *v.* Mangles . 399, 400, 402
Wodehouse, Ecclesiastical Commissioners *v.* . . 304
— *v.* Scobell, Repington, *Re* . . 564
Wolferstan, Jervis *v.* . . . 607
Wollaston *v.* Berkeley . . 376
Wollaston's Settlement, *Re* . 447, 480
Wolley, Bowler *v.* . . . 247
Wolsey, Neve *v.* 373
Wolveridge *v.* Steward . 484, 487
Wood, *Re*, Naden, *Ex parte* . 414
— Blunden *v.* . . . 17
— Broadmead *v.* . . 435
— Chapman *v.* . . . 351
— *v.* Copper Miners . . 487
— Furley *v.* 153
— Hamlyn *v.* . . 493, 497
— Hanley *v.* 241
— *v.* Hardisty . . . 488
— Jopp *v.* . . 447, 470, 477
— Mexborough *v.* . . . 506
— *v.* Rowcliffe . . . 217
— *v.* Saunders 244
— *v.* Slack 40
— *v.* Stourbridge Ry. Co. . 245
— Thackeray *v.* . . . 553
— Wilkins *v.* 133
— *v.* Wood (L. R. 4 Eq. 48) 439
— — (L. R. 10 Eq. 220) 615
Woodall *v.* Clifton . . 385, 390
Woodcock *v.* Dorset (Duke) 77, 480
Woodford *v.* Charnley . . 54
Woodhouse, Fuller *v.* . . . 102
— *v.* Futter . . . 102
— *v.* Jenkins . . 557, 558
Woodhouse's Trust, *Re* . . 414
Woodley *v.* Beere 287
Woodliff *v.* Drury . . 374, 394
Woodroff *v.* Greenwood . . . 501
Woodroffe, Daniell *v.* . . . 48
Woodrow, Glazebrook *v.* . . 530
Woods, Morton *v.* . . . 197
Woodward *v.* Aston . . . 29
— Burton *v.* . . . 158
— *v.* Gyles . . . 505
— Howard *v.* . 504, 507
— May *v.* . . . 513
Woodyard *v.* Dannock . . 546
Wooley *v.* Pickard 48
Woolf, Blake *v.* 556
Woolmore *v.* Burrows . 615, 619
Wootton *v.* Heal . . . 561
Wordsworth, Nicolson *v.* . . 20
Worledg *v.* Kingswel . . . 254
Worminghall (Inhabitants), R. *v.* 153
Worseley, Gerrarde *v.* . . . 205
Worsley, Foquett *v.* . . . 379
— *v.* Granville . . . 463
Worsley's Trusts, *Re* . . . 599

PAGE
Worthinge, Prowse *v.* . . . 448
Worthington *v.* Gimson . 252, 260
Wotton *v.* Hele 561
— and Edwin's Case . . 112
Wrangham *v.* Hersey . . . 161
Wray, Alderes *v.* 52
— *v.* Wray 179
Wreford, *Ex parte*, Ashby, *Re* . 344
Wrey, Henty *v.* . . . 455, 458
Wright, *Re* 228
— Bailey *v* . . 401, 409
— Bartlett *v.* . . . 216
— Browning *v.* 501, 545, 550, 552
— *d.* Plowden *v.* Cartwright 52
— *v.* Dicksons . . . 88
— *d.* Allingham *v.* Dowley . 342
— Fox *v.* 4
— Harrison *v.* . . . 507
— Hewitt *v.* 376
— *v.* Hobert . . . 390
— *v.* Kemp . . . 77, 340
— Olivant *v.* . . . 339
— *v.* Plumtree 405
— Vernon *v.* . . . 321
— *v.* Wakeford . . . 5, 22
— Wall *v.* . . . 87, 312
— Wells *v.* 92
— *v.* Wheatley . . . 159
— *v.* Wright (2 J. & H. 647) 349
— *v.* — (1 Ves. Sen. 409) 274
Wrightman, Button *v.* . . . 179
Wrightson *v.* Macaulay . . 318
Wrotesley *v.* Adams 212, 215, 220, 222, 226
Wroughton *v.* Turtle . . . 113
Wyatt, Barratt *v.* 186
— *v.* Stagg 20
Wyes, Harrington *v.* . . . 51
Wykham *v.* Wykham . . . 370
Wylde, *Re* 395
Wyllie, Wishart *v.* . . . 234
Wynch *v.* Grant 488
Wyndham's Trusts, *Re* . . 596
Wynston, Bould *v.* . . . 206
Wyot, Bull *v.* 164
Wyse *v.* Leahy . . . 127, 219
Wyth *v.* Blackman . . 416, 422
Wythe *v.* Thurlston . . 416, 422

X.

Xenos *v.* Wickham 8, 11, 13, 14, 15, 20, 21

Y.

Yate, Rolls *v.* 521
— *v.* Roules 521
Yates, *Re* 477
— Ford *v.* 136

PAGE
Yates, Luscombe *v.* 178
— *v.* Pym . . 132, 136
— *v.* Rolles 521
Year Books, Reference to (2 Edw. II. 29) 80, 292, 302
— (8 Edw. II. 267) . 289
— (18 Edw. II. fo. 577) . 324
— (2 Edw. III. pl. 1 & 2) 320
— (3 Edw. III. 28) . 323
— (7 Edw. III. 9b, pl. 20) 107
— (7 Edw. III. 10a) . 213
— (10 Edw. III. 43, pl. 4) 90
— (14 Edw. III., p. 276, pl. 11) . . . 173
— (17 Ed. III. 29, pl. 30) 445
— (18 Edw. III. 59, pl. 91) . . 393, 445
— (24 Edw. III. 29a) . 393
— (25 Edw. III. 83, pl. 9) 3
— (38 Edw. III. 26b) . 395
— (39 Edw. III. 11a) . 419
— (40 Edw. III. 5b) . 485
— (42 Edw. III. 5) . 315
— (44 Edw. III. 21, pl. 23) . . . 3
— (45 Edw. III. 19, 20, pl. 22) . 292, 302
— (47 Edw. III. 16b) . 105
— (48 Edw. III. 2, 3) . 525
— (11 Hen. IV. 74, pl. 14) 317
— (11 Hen. IV. 84b, pl. 34) . . 302, 304
— (12 Hen. IV. 1, pl. 3) 315
— (12 Hen. IV. 23, pl. 3) 3
— (2 Hen. V. 5b, pl. 26) 570
— (9 Hen. V. 8, pl. 2) . 304
— (4 Hen. VI. 22) . . 80
— (9 Hen. VI. 7a) . . 93
— (19 Hen. VI. 73, pl. 2) 301
— (22 Hen. VI. 15, pl. 28) 301
— (22 Hen. VI. 52, pl. 26) 561
— (38 Hen. VI. 25) . . 24
— (38 Hen. VI. 33b) . 284
— (39 Hen. VI. 13, pl. 17) 302
— (5 Edw. IV. 7, pl. 16) 374
— (8 Edw. IV. 8b) . . 22

PAGE
Year Books, reference to (9 Edw. IV. 39) . . 13
— (10 Edw. IV. 3b) . . 49
— (11 Edw. IV. 2a) . 98, 99
— (12 Edw. IV. 2, pl. 7) 317
— (5 Hen. VII. 1) . 52
— (9 Hen. VII. 16b) . 91
— (11 Hen. VII. 12, pl. 36) . . . 302
— (12 Hen. VII. 6b) . 106
— (15 Hen. VII. 14) . 395
— (21 Hen. VII. 18b) . 102
— (21 Hen. VII. 19) . 205
— (12 Hen. VIII. 8a) . 304
— (14 Hen. VIII. 13a) . 82
— (26 Hen. VIII. 3b) . 561
— (26 Hen. VIII. 6a) . 106
— (26 Hen. VIII. Trin., pl. 15) . . . 251
— (27 Hen. VIII. 5, pl. 15, and 7 pl. 21) . 303
— (27 Hen. VIII. 15, pl. 6) . . . 302
— (1 M. I.) . . . 27
Yeoman *v.* The King . . . 163
Ynisarwed Colliery Co., Neath Canal Co. *v.* 245
York (Archbishop), Berkeley *v.* . 31
— — , Metcalfe *v.* . 508
Youde *v.* Jones 225
Young, *Ex parte* 183
— *v.* Chalkley . . 505, 507
— Crosse *v.* 561
— Elmsley *v.* . . 398, 402
— Guepratte *v.* . . . 635
— Hayward *v.* . . . 571
— *v.* Higgon 169
— Hughes *v.* 601
— Jenkins *v.* 363
— Jolly *v.* . . 62, 72, 158
— *v.* Raincock . . 196, 552
— *v.* Smith . 182, 184, 582, 585
Younge *v.* Dymock . . . 363

Z.

Zouch *v.* Clay 34
— *v.* Empsey . . . 169

TABLE OF STATUTES.

PAGE

13 Edw. I. (1339) c. 1 (*De Donis Conditionalibus*) 305, 357
18 Edw. I. (1344) c. 1 (*Quia Emptores*) 373
11 Hen. VII. (1494) c. 20 (Alienation of husband's lands by widow) . . 336
23 Hen. VIII. (1531) c. 10 (Lessees and Tenants in Tail) 304
27 Hen. VIII. (1535) c. 10 (Statute of Uses) . . . . 303, 359 *et seq.*
13 Eliz. (1571) c. 5 (Fraudulent Deeds and Gifts) 204
27 Eliz. (1585) c. 4 (Fraudulent Conveyances) 204
29 Eliz. (1587) c. 5 (Statutes Continuance) 204
22 & 23 Car. II. (1670) c. 10 (Statute of Distributions) . . . 399, 401
29 Car. II. (1677) c. 3 (Statute of Frauds) 5, 8, 31, 353
s. 4 169
s. 12 354
s. 25 401
8 & 9 Will. III. (1696) c. 11, s. 8 (Vexatious Suits) . . . 503, 505
10 & 11 Will. III. (1698) c. 16 (Posthumous Children) 417
4 & 5 Anne (1705) c. 16, s. 9 (Attornment) 286, 297
6 Anne (1707) c. 35 (Yorkshire, E. Riding, Registry), ss. 30 and 34 . . 498
1 Geo. I. (1714) c. 10 (Queen Anne's Bounty Act), s. 21 304
4 Geo. II. c. 28 (Landlord and Tenant Act, 1730) 113
8 Geo. II. (1735) c. 6 (Yorkshire, N. Riding, Registry), s. 35 . . . 498
14 Geo. II. (1741) c. 20 (Common Recoveries), s. 9 354
24 Geo. II. c. 23 (Calendar, New Style, Act, 1750) . . . 151, 152
3 & 4 Will. IV. c. 74 (Fines and Recoveries Act, 1833), s. 47 . . 357, 614
c. 106 (Inheritance Act, 1833), ss. 3, 4 . 317, 318, 319, 320, 322, 376
6 & 7 Will. IV. (1836) c. 32 (Building Societies), s. 5 209
7 Will. IV. & 1 Vict. (1837) c. 26 (Wills Act), s. 6 354
7 & 8 Vict. c. 45 (Nonconformists Chapels Act, 1844), s. 2 . . . 146
8 & 9 Vict. c. 18 (Lands Clauses Act, 1845), s. 132 498
c. 106 (Real Property Amendment Act, 1845) s. 2 . . . 297
s. 4 . . . 498
s. 5 . 22, 24, 290
s. 8 . . . 357
13 & 14 Vict. (1850) c. 21 (Interpretation of Acts), s. 4 155
19 & 20 Vict. (1856) c. 25 (Drafts on Bankers) 40
19 & 20 Vict. c. 47 (Joint Stock Companies Act, 1856), s. 46 . . . 499
20 & 21 Vict. (1857) c. 57 (Malins' Act) 599
20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857), s. 25 . . . 413, 591
21 & 22 Vict. c. 108 (Matrimonial Causes Act, 1858), s. 8 413
22 & 23 Vict. c. 35 (Law of Property Act, 1859), s. 12 . . . . 5, 22
23 & 24 Vict. c. 134 (Roman Catholic Charities Act, 1860), s. 5 . . . 146
25 & 26 Vict. c. 89 (Companies Act, 1862), ss. 26, 49 154
30 & 31 Vict. c. 144 (Policies of Assurance Act, 1867) 605
32 & 33 Vict. c. 71 (Bankruptcy Act, 1869), s. 91 204
33 & 34 Vict. c. 14 (Naturalization Act, 1870), s. 2 626
c. 93 (Married Women's Property Act, 1870), s. 10 . . 392, 623
37 & 38 Vict. c. 42 (Building Societies Act, 1874), s. 42 209

PAGE

40 & 41 Vict. c. 33 (Contingent Remainders Act, 1877), s. 1 389
44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 4 354
s. 6 . . . . 249, 254, 262
s. 7 . . . . . 499, 548
s. 34 303
s. 36 627
s. 51 . 299, 301, 304, 309, 378
s. 54 207
s. 55 209
s. 63 . . . . . 271, 353
45 & 46 Vict. c. 38 (Settled Land Act, 1882) 53, 625
c. 39 (Conveyancing Act, 1882), s. 10 386
c. 43 (Bills of Sale, Amendment Act, 1882), s. 8 . . . 205
c. 75 (Married Women's Property Act, 1882) . 350, 395, 401, 599
s. 2 346
s. 11 . . . 623
s. 19 . . 603, 606
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883) s. 47 204
47 & 48 Vict. c. 54 (Yorkshire Registries Act, 1884) 498
48 & 49 Vict. c. 4 (Yorkshire Registries, Amendment, Act, 1884) . . 498
52 & 53 Vict. c. 63 (Interpretation Act, 1889) s. 3 155
53 & 54 Vict. c. 89 (Partnership Act, 1890), s. 20 396
55 & 56 Vict. c. 39 (Stockholders Relief Act, 1892), s. 6 394
56 & 57 Vict. c. 53 (Trustee Act, 1893), s. 12 303
s. 20 627
60 & 61 Vict. c. 65 (Land Transfer Act, 1897), s. 1 (1) 353
62 & 63 Vict. c. 20 (Bodies Corporate, Joint Tenancy Act, 1899) . . . 394

A TREATISE ON DEEDS.

CHAPTER I.

THE FORM AND EXECUTION OF DEEDS.

Definition of a Deed: Signing: Sealing: Delivery: Delivery by Corporation: Escrows: Disclaimer: Acceptance: Attestation: Indentures and Deeds Poll: Deeds "inter partes": Counterparts.

To give a satisfactory definition of a deed is very difficult, as the definition must comprise the technicalities necessary for a deed, and yet exclude those documents which, though fulfilling the technical requirements, are not deeds.

Incomplete definitions of deeds.

Lord Coke says: "'*A Deed' factum.* This word (deed) in the understanding of the Common Law is an instrument written in parchment or paper, whereunto ten things are necessarily incident; viz.: First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And Tenthly, delivery." Co. Litt. 35 b. And again, "*Factum, Anglicè*, a deed, and signifieth in the Common Law an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargaine or contract between party and party, man or woman. It is called of the civilians *literarum obligatio*:" Co. Litt. 171 b.

Sheppard says: "A deed is a writing or instrument, (*read* a contract,) written on paper, (vellum,) or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed:" Shep. Touch. 50. (The words in brackets were added by Preston.)

These definitions are obviously incomplete, for they do not include a grant.

Too extensive definitions.

"There are but three things of the essence and substance of

a deed, that is to say, writing in paper or parchment, sealing, and delivery:" *Goddard's Case* (1584), 2 Rep. 4 b at p. 5 a; S. C. *sub nom. Denton and Goddard's Case*, 3 Leon. 100.

Termes de la Ley, *s.v.*, "Fait," has "So thus you see that writing and sealing without deliverie is nothing to purpose, that sealing and deliverie where there is no writing work nothing, nor writing and deliverie without sealing also make no deed, and therefore they ought all jointly to concur to make a perfect deed, as is before said."

Somewhat similar definitions are given in Comyns' Digest, Fait. A. 1; Cruise's Digest, tit. xxxii. c. 1, s. 16; Tomlin's Law Dictionary, *s.v.* "Deed"; Wharton's Law Lexicon, *s.v.* "Deed"; Blackstone, Com. Bk. II. c. 20 (2nd ed. vol. 2, p. 295); Stephen's Commentaries, Bk. II. pt. 1. c. 16.

These definitions are obviously too large; they include every writing sealed and delivered, many of which are not deeds.

"It was argued that it did not follow, from the instrument being under seal, that it was a deed: for warrants of justices, subpoenas, and awards, are under seal, and are not deeds:" per Parke, B., *Hibblewhite* v. *McMorine* (1840), 6 M. & W. 200 at p. 214.

"Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I never heard it suggested that that is a deed:" per Bovill, C.J., *Reg.* v. *Morton* (1873), L. R. 2 C. C. R. 22 at p. 27.

Other definitions.

In Spelman's Glossary, title *Factum*, a deed is defined as "*Scriptum solenne quo firmatur donum, concessio, pactum, contractus et hujus modi;*" and Blackburn, J., in *Reg.* v. *Morton* (1873), L. R. 2 C. C. R. 22 at p. 27, says "The definition of a deed cited from Spelman seems to me the best."

"In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby

an interest or property passes, is a deed. . . . I by no means say that I have enumerated all the possible kinds of deeds; there may be others:" per Bovill, C.J., *Reg.* v. *Morton* (1873), L. R. 2 C. C. R. 22 at p. 27.

The following seems to be a correct definition:—

Definition of a deed.

> A deed is a writing (i.) on paper, vellum or parchment, (ii.) sealed and (iii.) delivered, whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed.

Where grantee disclaims.

It is unnecessary to extend the above definition so as to comprise documents of the nature aforesaid, whereby an interest, right or property would, but for the disclaimer of the grantee, have passed, as the better opinion seems to be that in cases of disclaimer the property vests in the grantee until disclaimer: *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

Documents held deeds.

The following document has been held to be a deed:—a power of attorney: *R.* v. *Lyon* (1813), R. & R. C. C. 255; *R.* v. *Fauntleroy* (1824), 2 Bing. 413; and the following documents have been held not to be deeds, though written, sealed, and handed over by the maker, even if not delivered in the technical sense:—an award: *Dod* v. *Herbert* (1655), Styl. 459; *Brown* v. *Vawser* (1804), 4 East, 584; a license to use a patented article: *Chanter* v. *Johnson* (1845), 14 M. & W. 408; a certificate of the grant of holy orders, or "letters of orders": *Reg.* v. *Morton* (1873), L. R. 2 C. C. R. 22.

Paper necessary.

A deed must be written on paper, vellum, or parchment, "for if an agreement be written on a piece of wood, linen, the bark of a tree, a stone, or the like, and this be sealed and delivered, this is no good deed:" Shep. Touch. 54.

Tally insufficient.

"If a man make a tally, and make a bond thereupon, and seal and deliver it as his deed, yet it shall not bind him, but he may plead against the same, that he owed him nothing, or wage his law. For an obligation ought to be made in writing in parchment or paper, and not written upon any piece of wood, as a tally is:" Fitzherbert, Nat. Brev. 122 I. (9th ed. p. 122); Y. B. 25 Edw. III. (1351) 83, pl. 9; 44 Edw. III. (1370) 21, pl. 23, and 12 Hen. IV. (1410) 23, pl. 3.

Wood or linen insufficient.

"A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can least be vitiated, altered, or corrupted:" Co. Litt. 35 b.

"And here it is to be understood that it (a deed indented) ought to be in parchment or in paper. For if a writing be made upon, a peece of wood, or upon a peece of linen, or in the barke of a tree, or on a stone or the like, &c., and the same be sealed or delivered, yet it is no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption:" Co. Litt. 229 a. A similar passage is to be found in Blackstone, Com. Bk. II. c. 20 (2nd ed., p. 297).

Print.

The writing may be in any language and in any hand: Shep. Touch. 54; and may be in print: 2 Bl. Com. Bk. II. c. 20 (2nd ed., p. 297); may be written in the third or first person: Littleton, ss. 371, 373; and may be in a book: *Fox* v. *Wright* (1597), Cro. Eliz. 613.

When reading over necessary.

If the party to seal a deed be blind or illiterate and desire to have it read (or its contents declared), it must be read (or the contents declared), but if he do not desire to have it read or its contents declared, or if the party to seal a deed can read it and does not, then it is good though it is contrary to his mind. And if it be read falsely, or its contents falsely declared, and the party seal and deliver it, it is not his deed: Shep. Touch. 56.

"Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. But I cannot come to that conclusion here. The defendants trusted Jackson both as their brother and solicitor, and cannot be said to have been guilty of negligence in so doing. On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails." Per Cotton, L.J., *Nat. Prov. Bank* v. *Jackson* (1886), 33 Ch. D. 1 at p. 10.

When deed is void.

The authorities in support of the proposition are: Shep. Touch. 54 and 56; Bl. Com. Bk. II. c. 20 (2nd ed., pl. 304); Com. Dig. Fait, B. 2; *Manser's Case* (1583), 2 Rep. 3 a; Moore, 182, pl. 326; *Thoroughgood's Case* (1583), 2 Rep. 9 a; 1 Anderson, 129; S. C. *sub nom. Thoroughgood* v. *Turner*, Moore, 148; *Shulter's Case* (1611), 12 Rep. 90; *R.* v. *Inhabitants of Longnor* (1833), 4 B. & Ad. 647; 1

N. & M. 576 ; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704 at p. 711 ; *Hunter* v. *Walters* (1871), L. R. 7 Ch. 75 ; but unless actual misstatement of the effect of the deed is made the deed is only voidable: *Nat. Prov. Bank* v. *Jackson* (1886), 33 Ch. D. 1; *King* v. *Smith*, [1900] 2 Ch. 425. If three obligations are written on one piece of parchment and one only is read to an illiterate person who executes the deed, he is only bound by such obligation: *Pigot's Case* (1614), 11 Rep. 26 b at p. 27 b.

When only voidable.

Signing is not necessary to make a deed valid as such at common law, nor, contrary to Blackstone's opinion, Com. Bk. II. c. 20 (2nd ed., p. 305), by the Statute of Frauds (29 Car. II. c. 3). "But whether the parties to the deed write in the end their names or set to their marks, as it is commonly used, it matters not at all (as I think) for that is not meant where it is said that every deed ought to have writing:" Termes de la Ley, *s.v.* "Fait;" Preston in Shep. Touch. 56; Shep. Touch. 60 ; 3 Prest. Abst. 61 ; *Cromwell* v. *Grunsden* (1697), 2 Salk. 462 ; 1 Ld. Raym. 335 ; Holt, 502 ; S. C., *sub nom. Cromwell* v. *Grimsdale*, Comb. 477 ; *Elliot* v. *Davies* (1800), 2 Bos. & Pul. 338 ; *Wright* v. *Wakeford* (1811), 17 Ves. 454 at p. 459 ; *Taunton* v. *Pepler* (1820), 6 Madd. 166 ; *Aveline* v. *Whisson* (1842), 4 Man. & Gr. 801 ; *Cherry* v. *Heming* (1849), 4 Ex. 631 ; *Tupper* v. *Foulkes* (1861), 9 C. B. N. S. 797 ; see especially per Williams, J., at pp. 801 and 803. Of course in practice the signature should never be omitted.

Signing unnecessary.

But if a document be required to be under *hand* and seal, *e.g.*, the execution of a power, then it is not well executed as an execution of the power if it be sealed and delivered only without being signed, though it would be a good deed. And if reliance has to be placed on the provisions of sect. 12 of the Law of Property Act, 1859 (22 & 23 Vict. c. 35), signing may be necessary, as the Act provides "a deed hereafter executed in the presence of and attested by two or more witnesses *in the manner in which deeds are ordinarily executed* and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in

When signing necessary.

order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

Sealing

Sealing is essential to a deed. "The fourth thing required in every well made deed is that it be sealed; no writing without a seal can be a deed:" Shep. Touch. 56; Co. Litt. 6 a, 35 b, and 171 b; Termes de la Ley, *s.v.* "Fait;" Blackstone, Com. Bk. II. c. 20 (2nd ed., p. 305); Perk. s. 130; *Goddard's Case* (1584), 2 Rep. 4 b at p. 5 a; *Hollingworth* v. *Ascue* (1592), Cro. Eliz. 355; *Southwel* v. *Brown* (1596), Cro. Eliz. 571; *Cabell* v. *Vaughan* (1670), 1 Wms. Saunders, 291 (see notes); 1 Vent. 34; 2 Keble, 525, 528; 1 Sid. 420; *Putt* v. *Nosworthy* (1671), 1 Vent. 135. But a deed need not be sealed by the party, or with his seal, if he recognises the seal as his. Any seal will do, even a borrowed seal: Bracton, Lib. II. c. 16, s. 12, fo. 38; Britt. Lib. II. c. 8, s. 10, fo. 101; Fleta, Lib. III. c. 14, s. 13. "It is nothing to charge whether it be sealed with the seal of the grantor or not, or by a stranger, or by the grantor": Perk. s. 130, and see s. 131; Shep. Touch. 57.

Not only may any seal be used, but so may "a stick or any such like thing which doth make a print:" Shep. Touch. 57. In Termes de la Ley, *s.v.* "Fait," reference is made to a charter of Edward III. of which the last two lines run in the English translation thus—

> "And in witness that it was sooth
> He bit the wax with his foretooth."

What is a sufficient seal.

Another instance of biting the wax is mentioned in the same place. An impression made in ink with a wooden block is sufficient: *Reg.* v. *Inhabitants of St. Paul, Covent Garden* (1845), 7 Q. B. 232. This was an order of justices for removal of a pauper and not a deed, but one of the questions debated was whether it was well sealed. "To constitute a sealing neither wax nor wafer, nor a piece of paper, nor even an impression is necessary:" per Bovill, C.J., *In re Sandilands* (1871), L. R. 6 C. P. 411 at p. 413; S. C. *sub nom. Re Mayer*, 19 W. R. 641. "The sealing of a deed need not be by means of a seal, it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used:" per Byles, J., *Ibid.* But some act must be done "with the intention of sealing:" per Montague Smith, J., *Ibid.*; and see Sugden on

Powers, c. 7, s. 4, par. 9 (8th ed. p. 232). "If the finger be pressed on the ribbon that may amount to a sealing:" per Cotton, L.J., *Nat. Prov. Bank of England* v. *Jackson* (1886), 33 C. D. 1 at p. 11; 34 W. R. 597. The question whether a deed was or was not sealed by a particular person is one of fact to be determined on the evidence given in each case: per Cotton, L.J., *Nat. Prov. Bank of England* v. *Jackson, ubi sup.*

One seal sufficient.

One piece of wax will serve for several executing parties, provided they make distinct and several prints: Shep. Touch. 57; Perk. s. 134; and one person may by proper authority seal on behalf of several executing parties if those parties treat the seal as their seal: Shep. Touch. 57; Perk. ss. 130, 131; *Lovelace's Case* (1632), W. Jo. 268; *Ball* v. *Dunsterville* (1791), 4 T. R. 313; *Cooch* v. *Goodman* (1842), 2 Q. B. 580 at p. 598; but the person so sealing must have authority to seal on behalf of the others, or those parties must treat the seal as their seal: Shep. Touch. 57; *Harrison* v. *Jackson* (1797), 7 T. R. 207; *Elliot* v. *Davis* (1800), 2 Bos. & P. 338; and a partner has no general authority to execute a deed in the names of his co-partners: *Marchant* v. *Merton*, [1901] 2 K. B. 829; but if he executes in the partnership name the execution is a good execution by him personally: *Metcalfe* v. *Rycroft* (1817), 6 M. & S. 75.

Partners.

The seal may be affixed to the document before it is actually written, it must be affixed before the document is delivered: see Preston in Shep. Touch. p. 57; Finch, Law, Bk. II. c. 2, 108.

Unsealed paper incorporated.

A paper not under seal may be incorporated in a deed: *Routledge* v. *Burrell* (1789), 1 Hy. Bl. 255.

What is sufficient sealing.

In *Re Sandilands* (1871), L. R. 6 C. P. 411, a deed which had been sent to Melbourne to be executed and acknowledged by a married woman under a special commission, and returned with a certificate of the commissioners that it had been duly acknowledged, and an attestation clause stating that the deed had been signed, sealed, and delivered, was held to have been in fact sealed though there were only green ribbons, without any seal or impression thereon, attached to the place where the seal should have been; but in *Nat. Prov. Bank of England* v. *Jackson* (1886), 33 C. D. 1; 34 W. R. 597, Cotton, L.J., in commenting on that case, said the certificate (of the commissioners), not the attestation clause must have been relied on as evidence of due execution, and if not he could not agree with the decision; and Lindley, L.J., said it was "a good-natured decision in which I am not sure that I could have concurred."

What is insufficient sealing.

In *Nat. Prov. Bank of England* v. *Jackson* (1886), 33 C. D. 1; 34 W. R. 597; a voluntary conveyance which had only a piece of ribbon attached to the place where the seal should have been, and no seal nor impression thereon, and which had been retained by the grantor, and of which the grantee was in ignorance, was held never to have been in fact sealed, and to be invalid though the attestation clause stated it was signed, sealed, and delivered, and the witness admitted his signature as a witness, but could remember nothing about the execution; and in *Re Balkis Consolidated Co. Limited* (1888), 36 W. R. 392; 58 L. T. 300; a transfer of shares contained only a place for a seal but no impression, and though the attestation clause stated the instrument to have been signed, sealed and delivered, North, J., refused to presume that it had in fact been sealed: but *semble* in any event the instrument was inoperative as having been executed without the name of a transferee.

Delivery.

Delivery is essential to a deed: Co. Litt. 35 b, 171 b; Shep. Touch. 50; *Goddard's Case* (1584), 2 Rep. 4 b; for "*traditio facit loqui chartam:*" *Clayton's Case* (1584), 5 Rep. 1; 4 Cru. Dig. p. 28, s. 79; Bl. Com. Bk. II., c. 20 (2nd ed. p. 306). "Delivery is that act by which effect is given to the deed:" Prest. Abst. vol. 3. p. 63. "After a deed is written and sealed, if it be not delivered all the rest is to no purpose:" Termes de la Ley, *s.v.* "Fait." "The operative part of the ceremony is the delivery:" per Keating, J., *Tupper* v. *Foulkes* (1861), 9 C. B. N. S. 797 at p. 803; see also per Williams, J., *Ibid.* at p. 803. "A deed has no operation until delivery:" per Bayley, J., *Styles* v. *Wardle* (1825), 4 B. & C. 908 at p. 911; Bl. Com. Bk. II. c. 20 (2nd ed. p. 307). "Where a contract is to be by deed, there must be delivery to perfect it. . . . This is a positive absolute rule of the common law, which nothing but an Act of Parliament can alter, and which in my judgment ought not to be frittered away:" per Martin, B., *Xenos* v. *Wickham* (1863), 14 C. B. N. S. 435 at p. 473.

Alteration before delivery.

It follows that a deed can be altered before delivery: Brooke's Abr. tit. Faits, 327, pl. 61.

Charters of feoffment.

Lord Coke (Co. Litt. 7 a) remarks that in ancient charters of feoffment there is no mention of the delivery of the deed, and Bracton (Lib. II. c. 16, s. 12, fo. 38), and Fleta (Lib. III. c. 14, s. 13), in discussing charters of feoffment, mention sealing, but say nothing of delivery; but a charter of feoffment was merely evidence of a conveyance, and until the Statute of Frauds (29 Car. II. c. 3) was not a necessary part of it, the estate passing by livery of seisin: 2 Sanders, Uses and Trusts, tit. Feoffment, p. 3 (5th ed.).

A deed takes effect from delivery, and so if a deed and will dealing with the same subject-matter are made on the same day, the deed is effective, and not the will: *Cochin* v. *Heathcote* (1773), Lofft, 190.

Sealing by corporation is not delivery.

It is said in Grant on Corporations, p. 147, that the affixing of the common seal to the deed of a corporation is tantamount to a delivery; and a similar statement is contained in Cruise's Digest, vol. 4, tit. Deed, c. 2, s. 81. But there is no authority for such a proposition; indeed what authority there is on the point is the other way, and the statement cannot be accepted as law. Grant took the proposition from Comyns' Digest (Fait A. 3), quoting also *Anon.* (1674), 1 Vent. 257; *Derby Canal Co.* v. *Wilmot* (1808), 9 East, 360; and *Dean and Chapter of Fernes' Case* (1607), Davis, 44 b. Comyns gives as his authority 2 Roll. Abr. 23, l. 50 (where *Willis* v. *Jermin* and an extract from the *Case of the Dean and Chapter of Fernes* (both hereinafter mentioned) are cited), and Dav. 44, which is the reference to that extract. (The point is also referred to in 2 Roll. Abr. p. 24, ll. 1 and 25.) The editor of Comyns has added a further reference to *Willis* v. *Jermin* (1589), Cro. Eliz. 167, where the decision is directly the contrary of the proposition. Cruise gives no authority for the proposition, and merely cites 9 East, 360, as a qualification of it.

Wood's Conveyancing, vol. 1, p. 194, quotes *Willis* v. *Jermin*, and makes a similar statement, citing Rolle, *loc. cit.*, and Dav. 44 b, but adds "*sed vide* Co. Litt. 36 a, note 5." That note cites *Hayward* v. *Fulcher* (1627), W. Jo. 166; Palmer, 491; and Dav. 44; *Willis* v. *Jermin;* and the case cited by Lord Hale at W. Jo. p. 170; Palmer, p. 504. In 1 Roll. Abr. 1, p. 830, it is stated that a corporation out of possession cannot effectively seal a lease and execute a letter of attorney to deliver it on the land, but they might put their lease in writing and make a letter of attorney *to seal and deliver the lease as their deed;* but the learned editor states that the decision in *Willis* v. *Jermin* is to the contrary.

The cases discussed.

In *Willis* v. *Jermin* (1589), Cro. Eliz. 167; S. C. *sub nom. Willis and Jermine's Case*, 2 Leon. 97, a corporation who were not in possession sealed a lease and gave a letter of attorney to enter and make delivery of the deed upon the land. It was objected that the lease was not good, because the corporation let the land by putting their seal to the deed, *which being a perfecting the deed of the corporation*, there can be no other delivery, and as they were out of possession the lease was void, and the delivery after by the attorney, it having a former delivery, is void; *sed non allocatur*, for there is no other means for a corporation to make a lease but this,

and Gawdy, J., said: "It is plain that it is not the lease or deed of the corporation until delivery, as of another person."

In the *Case of the Dean and Chapter of Fernes* (1608), Davis, 42 b, one of the counsel arguing the case said (44 b): "Et le fait de un corporation ne besoigne delivery come le fait de un natural person mes le apposition del commone seale done perfection a ceo solement," but gave no authority for the argument. (The references to Lib. Ass. are to the rest of the paragraph.) The same point arose in *Hayward* v. *Fulcher* (1627), W. Jo. 166 at p. 170; Palm. 491 at p. 504, where the Judges appear to have differed as to whether the lease was or was not good, and the reporters do not agree as to the Judges who held such different opinions. The point arose again in *Good* v. *Ash* (1675), 3 Keb. 307; S. C. *Anon.*, 1 Vent. 257. In the short report in Ventris it is stated that it was "held to be a good lease, for though the putting the seal of a corporation aggregate to the deed carries with it a delivery, yet the letter of attorney to deliver it upon the land shall suspend the operation of it while (? till) then;" while in the report in Keble it is stated that "Twisden, J., doubted" the lease "was void, being a perfect lease by sealing, and the delivery after insignificant; but Hales, C.J., said that since he came to this Court it was ruled that the later execution is good, and the first lease sealed is but as an escrow when the letter of attorney is delivered at the same time, so *Gorman* and *Willis*, 3 Cr. 167" (evidently a reference to *Willis* v. *Jermin* (1589), Cro. Eliz. 167).

Corporation can deliver as escrow.

In *Derby Canal Co.* v. *Wilmot* it was held that a deed sealed by a corporation was an escrow, for in order to give "the deed" of a corporation "effect, the affixing of the seal must be done with intent to pass the estate, otherwise it operates no more than a feoffment would do without livery of seisin:" per Lord Ellenborough, C.J., *Derby Canal Co.* v. *Wilmot* (1808), 9 East, 360.

It is true that in *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762, Fry, J., says at p. 768: "A deed executed by a company requires no delivery to make it effectual. Therefore there could be nothing whatever in the nature of delivery as an escrow, and the deed was complete the moment that it received the seal of the company. I do not forget that the company retained the debentures after they were sealed, as they were entitled to do until they received the money for them; nor do I mean for one moment to indicate that the debenture-holders could have sued the company upon the debentures before the actual delivery to them, or the actual payment of the money by them;" but the

latter part of the sentence implies that delivery was necessary to perfect the deed.

And in *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. Div. 58, it was held that debentures sealed by a company were not effective, and Cotton, L.J., said at p. 62: "The debentures must be delivered before they can be binding on the company. The fact of their being dated and sealed does not show that they were delivered."

"The affixing of the seal is not enough: there must be a delivery of the deed also: *Derby Canal Co.* v. *Wilmot* (1808), 9 East, 360. *Primâ facie* putting the seal imports delivery; yet if it be intended otherwise it is not so:" per Wills, J., *Mayor, &c. of Merchants of the Staple of England* v. *Governor & Co. of the Bank of England* (1887), 21 Q. B. D. 160 at p. 165.

Delivery how effected.

Delivery may be effected by words alone, or without words by the acts or conduct of the party, from which it can be inferred that he intended to deliver the deed as an instrument binding on him: Co. Litt. 36 a and 49 b; Shep. Touch. 57; *Thoroughgood's Case* (1612), 9 Rep. 136 a.

"No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing of the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him it is sufficient. . . . Any words or acts that sufficiently show that it was intended to be finally executed will do:" per Blackburn, J., *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 at p. 312.

"It is a question of intention and fact to be tried by the jurors:" per Pigott, B., *Ibid.* at p. 309. "Anything to show that he treated the deed as his is enough:" per Williams, J., *Tupper* v. *Foulkes* (1861), 9 C. B. N. S. 797 at p. 809.

Examples of delivery.

Thus it has been held a sufficient delivery:—Where the deed was delivered to B. to give to C., who refused to accept it: *Taw* v. *Bury* (1557), 1 And. 4; Dyer, 167 b (but see *Butler and Baker's Case* (1591), 3 Rep. 25 a at p. 26 b, and *Whelpdale's Case* (1604), 5 Rep. 119). Where the obligor handed the obligation to the obligee with the words "This will serve": *Parker* v. *Tenant* (1560), 2 Dy. 192 b, pl. 26. Where the deed was left behind and not countermanded: *Shelton's Case* (1581), Cro. Eliz. 7. Where a release was cast upon the table and the releasor said: "There, this will serve": *Hollingworth* v. *Ascue* (1593), Cro. Eliz. 355, 461, 494 and 544. Where the deed was given by a third party in the grantor's presence

and he received the money: *Goodright* v. *Gregory* (1773), Lofft, 339. Where the parties met for the purpose of executing the deed: *Tupper* v. *Foulkes* (1861), 9 C. B. N. S. 797. Where there was conduct from which delivery was inferred: *Rex* v. *Inhabitants of Longnor* (1833), 4 B. & Ad. 647; *Keith* v. *Pratt* (1862), 10 W. R. 296; *Evans* v. *Grey* (1862), 9 L. R. Ir. 539.

What is not sufficient delivery.

But in *Stanton* v. *Chamberlain* (1587), Owen, 95; 1 Leon. 140; S. C. *sub nom. Chamberlain* v. *Stanton*, Cro. Eliz. 122, where the defendant caused a bond to be written, and signed and sealed it, and then laid it upon the table, and the plaintiff, the defendant not being present, came and took it, there was held to be no delivery, but "if the jury had found that the defendant had sealed the bond and cast it upon the table towards the plaintiff to the intent that the plaintiff should take it as his deed, who took the bond and went away, that had been a good delivery; or that the plaintiff, after the sealing and casting on the table, had taken it by the commandment or consent of the defendant."

And payment of interest by a married woman after her husband's death has been held not sufficient delivery by her of a mortgage made by her and her husband: *Drybutter* v. *Bartholomew* (1723), 2 P. Wms. 127; 2 Eq. Ca. Abr. 132, pl. 4.

Whether redelivery can be presumed.

In *Goodright* d. *Carter* v. *Straphan* (1774), 1 Cowp. 201, a married woman and her husband had by deed demised land of the wife's by way of mortgage; such deed was of course ineffectual to bind the wife, but after her husband's death she had signed (i.) an account allowing interest on the mortgage, (ii.) a writing surrendering possession to the executors of the mortgagee, and (iii.) a direction to the tenant to attorn tenant to the executors of the mortgagee; *Held*, that these facts were a confirmation of the mortgage upon the ground of their being equivalent to a redelivery of the deed, which had remained in the hands of the mortgagee. But on this case Bowen, L.J., said in *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555 at p. 563: "I am by no means satisfied that in that case there was anything more than an estoppel which arose between the parties;" and the Court of Appeal, in *Powell* v. *London and Provincial Bank*, *ubi sup.* affirming Wright, J., [1893] 1 Ch. 610, *held* that redelivery of a transfer of shares signed in blank and given as security for a debt to the transferees and afterwards filled up by them with their name could not be presumed, though the transferees gave notice to the transferor of their intention to register the transfer, and credited him in account with the dividends received by them after such registration, and gave him notice of

such credits, and he authorised them to sell the stock upon certain conditions. The question of presuming redelivery is also discussed in *Hudson* v. *Revett* (1829), 5 Bing. 368.

A corporation must deliver its deeds at a corporate meeting or by attorney.

Delivery by corporation.

"If delivery" (*sc.* of a deed by a corporation) "be made upon a different occasion" (*i.e.*, an occasion different from that on which it is sealed) "and not at a corporate meeting, it must be done by some person acting under a power of attorney from the corporation: *Anon.* (1675), 1 Vent. 257. It seems to be very old law that (except under a power of attorney, which of course must be subject to the same rules as any other deed) the delivery must be made at a duly constituted meeting of the corporation: Brooke's Abridgment, tit. Corporations, pl. 72, citing the Year Book, 9 Edw. IV. (1469) p. 39, a passage which entirely bears out the Abridgment: " per Wills, J., *Mayor, &c. of Staple* v. *Bank of England* (1887), 21 Q. B. D. 160 at p. 166. But delivery as an escrow at the corporate meeting is sufficient, and on performance of the condition no further delivery is necessary.

Trading corporations.

As a matter of practice, the directors of joint stock and other trading companies are in the habit of executing deeds, on behalf of such companies, otherwise than at a meeting of the company (*i.e.*, of the shareholders), and their authority for doing so would appear to be the statutory force given to the articles of association of joint stock companies by the provisions of the Companies Acts, 1862 to 1900, or the fact that business can only be carried on by their so doing. "Whoever, as a matter of practice, manages the affairs of a trading corporation, must of necessity be able to use the seal for those acts which he is authorised to perform:" per Cairns, L.J., *Re Barned's Banking Co.* (1867), L. R. 3 Ch. 105 at p. 116.

Grantor may retain possession.

It is not necessary that a deed be physically delivered to the grantee or other party to the deed: *Alford* v. *Lee* (1586), Cro. Eliz. 54; *Doe* d. *Garnons* v. *Knight* (1826), 8 D. & R. 348; 5 B. & C. 671; 4 L. J. (O. S.) K. B. 161; nor that it should be physically delivered to any person or pass out of the maker's control.

If the delivery is complete and unconditional it is not the less so because the maker retains the deed in his possession: *Xenos* v. *Wickham* (1862), 13 C. B. N. S. 381; (1863), 14 C. B. N. S. 435; (1867), L. R. 2 H. L. 296.

"In the ordinary case of a deed executed and left with the party's

attorney, unless it is delivered to the attorney as an escrow, not to be delivered until the consideration money is paid or some other condition is performed, it operates as a perfect deed:" per Williams, J., *Kidner* v. *Keith* (1863), 15 C. B. N. S. 35 at p. 40.

"Everything was done on the part of the company which was intended to be done to complete the execution; and from that moment, although the policy was retained by the company until sent for by the assured or their broker, it was a binding and complete instrument:" per Mellor, J., *Xenos* v. *Wickham* (1863), 14 C. B. N. S. 435 at p. 451.

"The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it:" per Lord Cranworth, *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 at p. 323.

"Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense:" per Pigott, B., *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 at p. 309.

Authorities to the same effect are *Barlow* v. *Heneage* (1702), Prec. Ch. 211; 2 Eq. Ca. Abr. 283, B. 2; *Lady Hudson's Case* (1704), 2 Eq. Ca. Abr. 52, pl. 5; *Clavering* v. *Clavering* (1704), Prec. Ch. 235; 2 Vern. 473; 1 Eq. Ca. Abr. 24, pl. 6; affirmed on appeal in D. P. (1705), 7 Bro. P. C. 410; *Sepalino* v. *Twitty* (1729), Sel. Ca. Ch. temp. King, 75; 2 Eq. Ca. Abr. 287; *Boughton* v. *Boughton* (1739), 1 Atk. 625; *Grugeon* v. *Gerrard* (1840), 4 Y. & C. Exch. 119; *Alleyne* v. *Alleyne* (1845), 2 Jo. & Lat. 544; *Phillips* v. *Edwards* (1864), 33 Beav. 440 at pp. 446, 447; while *Naldred* v. *Gilham* (1719), 1 P. Wms. 577; 2 Eq. Ca. Abr. 52, pl. 7; *Cotton* v. *King* (1726), 2 P. Wms. 358; 2 Eq. Ca. Abr. 53, pl. 10; and *King* v. *Cotton* (1732) 2 P. Wms. 674, are decisions to the contrary.

Concealed deed.

The operation of a deed is not suspended by the fact that the person entitled to the benefit of it is ignorant of its existence.

Where land was limited to A. for life, remainder to his son in tail, remainder to B., and A. before the birth of any son surrendered his life estate to B., who was unaware thereof until after the birth of a son to A., but then accepted the surrender, *held*, the surrender was good: *Sir Simon Leech's Case* (1692), Carth. 250; S. C. *sub nom. Thompson* v. *Leach*, 1 Show. 296; 3 Mod. 296; 2 Vent. 198; 3 Lev. 284; 2 Salk. 618.

Voluntary settlement.

Voluntary settlement never communicated to the beneficiaries, retained by the settlor and found after his death among his waste

papers, upheld against a subsequent voluntary settlement made public, and against a will: *Clavering* v. *Clavering* (1704), 2 Vern. 473, 1 Eq. Ca. Abr. 24, pl. 6; on appeal (1705), 7 Bro. P. C., Ed. Tom. 410; *Barlow* v. *Heneage* (1702), Prec. Ch. 211; 2 Eq. Ca. Abr. 283, B. 2; and *Cecil* v. *Butcher* (1821), 2 J. & W. 565.

Mortgage.

Mortgagor retained mortgage deed in his own possession and did not communicate its existence to the mortgagee: it was found after his death. *Held*, that it took effect from its execution and was good against creditors: *Exton* v. *Scott* (1833), 6 Sim. 31; *Fletcher* v. *Fletcher* (1844), 4 Ha. 67; *Re Way's Trusts* (1864), 2 De G. J. & S. 365.

A., being indebted to a bank, executed a mortgage to them which was retained by his solicitor till after A.'s bankruptcy, and then handed over by the solicitor to the bank. *Held*, that it was good as against the assignee in bankruptcy: *Grugeon* v. *Gerrard* (1840), 4 Y. & Col. Ex. 119; *Sharp* v. *Jackson*, [1899] A. C. 419; *Re MacCallum, MacCallum* v. *MacCallum*, [1901] 1 Ch. 143.

Trust estates.

The doctrine applies to trust estates: *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Standing* v. *Bowring* (1885), L. R. 31 Ch. D. 282; *Mallott* v. *Wilson* [1903], 2 Ch. 494.

Effect of want of notice to trustees.

The operation of a deed is not suspended by the absence of notice to trustees, where such notice is essential for perfecting an assignment made by the deed: *Donaldson* v. *Donaldson* (1854), Kay, 711; *Re Way's Trusts* (1864), 2 De G. J. & S. 365.

Escrows.

If an instrument be delivered to take effect on the happening of a specified event, or upon condition that it is not to be operative until some condition is performed, then pending the happening of the event or the performance of the condition the instrument is called an escrow. "The maker [of a deed] may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow:" per Lord Cranworth, *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 at p. 323.

Sheppard's distinctions.

Sheppard draws a distinction between two kinds of escrow: (i.) where the grantor delivers the deed to A. to deliver to the grantee on fulfilment of a condition or the happening of an event, in which case the deed requires a second delivery to make it

effective; (ii.) where the grantor delivers the deed to take effect upon the fulfilment of a condition or the happening of an event, but without requiring a second delivery, in which case the deed becomes effective on the fulfilment of the condition or happening of the event without more: Shep. Touch. 59.

In Shep. Touch. (p. 58) "two cautions" are given, viz., (i.) that an apt and proper form of words be used: the instrument must be expressly delivered "as an escrow" and not "as a deed"; and (ii.) that it must be delivered to a stranger, and not to the person who takes the benefit of it. But neither of these propositions is now law. As regards the first proposition: "It was not necessary that any express words should be used at the time. The conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party if at the time of the delivery he expressly declared that he delivered it as an escrow; but that was not essential to make it an escrow:" per Abbott, C.J., *Murray* v. *Earl Stair* (1823), 2 B. & C. 82 at p. 88; 3 D. & R. 278. "It is quite settled, that it is not necessary, in delivering an instrument as an escrow, to say that it is delivered as an escrow:" per Sugden, C., *Nash* v. *Flynn* (1844), 1 Jo. & Lat. 162 at p. 175; 6 Ir. Eq. Rep. 565. And as regards the second proposition, the rule laid down in the old books means that the delivery must be "of a character negativing its being *a delivery* to the grantee or to the party who is to have the benefit of the instrument. . . . If upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument:" per Hall, V.-C., *Watkins* v. *Nash* (1875), L. R. 20 Eq. 262 at p. 266; and see *Furness* v. *Meek* (1857), 27 L. J. Ex. 34.

No formal words necessary.

Escrow may be handed to grantee.

In a case where A. B. and W. were trustees of a sum of 9,000*l.* lying idle in the hands of W., who was also solicitor to the plaintiff company which had property to mortgage, and W. prepared a mortgage by the company to A. B. and himself of the property for 9,000*l.* which the company executed and delivered to W., who never paid the money to the company, it was *held* that the deed was not intended to be delivered as an escrow: but "We are not prepared to go so far as to say that as Wynne was himself one of the mortgagees and a party to the deed it could not in point of law be an escrow in his hands," and, after referring to authorities,

"But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that, where there are several grantees and one of them is also the solicitor of the grantor and of the other grantees and the deed is delivered to him, evidence is not admissible to show the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable, and we do not think we are compelled by authority to exclude it:" per Lindley, M.R., *London Freehold and Leasehold Property Co.* v. *Suffield*, [1897] 2 Ch. 608 at p. 621; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102.

The old rule probably depended on estoppel, for "when there is a delivery, that estops the parties to the deed; that is a technical reason why a deed cannot be delivered as an escrow to the other party:" per Crompton, J., *Pyne* v. *Campbell* (1856), 6 E. & B. 370 at p. 374; 25 L. J. Q. B. 277; 2 Jur. N. S. 641.

Old authorities.

The authorities for the old rule are: *Morice* v. *Leigh* (1537), Dyer, 34 b; *Whyddon's Case* (1595), Cro. Eliz. 520; S. C. *sub nom. Whiddon's Case*, Noy, 6; *Perryman's Case* (1598), 5 Rep. 84; *Williams* v. *Green* (1601), Cro. Eliz. 884; Moore, 642; *Blunden* v. *Wood* (1605), Cro. Jac. 85; *Thoroughgood's Case* (1612), 9 Rep. 136 b at 137 a; *Holford* v. *Parker* (1619), Hob. 246; *Port* v. *Midleton* (1650), Styl. 251; *Bushel* v. *Pasmore* (1703), 6 Mod. 217; Co. Litt. 36 a; Vin. Abr. Fait, O. p. 28, where are cited other cases; and Bl. Com. Bk. II. c. 20 (2nd ed., p. 307) (followed *verbatim* and without comment in Stephen's Com. Bk. II. pt. 1, c. 16, p. 492 (8th ed.)). But *Wilcock* v. *Hewson* (1596), Moore 696; *Hawksland* v. *Gatchel* (1600), Cro. Eliz. 835; and *Johnson* v. *Herne* (1602), Noy, 49, are in accordance with the modern law.

Question is one of intention.

Whether the document was delivered as an escrow or as a deed is a question of what the parties intended, and that intention may appear either from their statements or the circumstances. "You are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction, and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was preformed, it will nevertheless operate as an escrow:" per Parke, B., *Bowker* v. *Burdekin* (1843), 11 M. & W. 128 at p. 147; and see *Johnson* v. *Baker* (1821), 4 B. & Ald. 440; *Murray* v. *Earl of Stair* (1823), 2 B. & C. 82; 3 D. & R. 278; *Grugeon* v. *Gerrard* (1840), 4 Y. & C. Exch. 119; *Gudgen* v. *Besset* (1856), 6 E. & B. 986; 26 L. J. Q. B. 36; 3 Jur. N. S. 212;

Millership v. *Brookes* (1860), 5 H. & N. 797; 29 L. J. Exch. 369; *Kidner* v. *Keith* (1863), 15 C. B. N. S. 35 at p. 43.

Examples of delivery as escrow.

Thus the delivery, of a transfer of mortgage was held to be an escrow, until the mortgage money had been paid: *Griffin* v. *Clowes* (1854), 20 Beav. 61; and of a conveyance, until the purchase money had been paid: *Phillips* v. *Edwards* (1864), 33 Beav. 440 at pp. 446, 447; *Walker* v. *Ware Ry. Co.* (1865), 35 Beav. 52 at p. 58.

The circumstances relied upon to show delivery as an escrow must be prior to or contemporaneous with, not subsequent to, the delivery: *Doe* d. *Lloyd* v. *Bennett* (1837), 8 Car. & P. 124.

Evidence of circumstances admissible.

Evidence is of course admissible as to what were the circumstances attending the delivery: per Jervis, C.J., *Davis* v. *Jones* (1856), 17 C. B. 625 at p. 634; *Wallis* v. *Littell* (1861), 11 C. B. N.S. 369; and the question is in general one of fact for the jury: per Channel, B., *Furness* v. *Meek* (1857), 27 L. J. Ex. 34 at p. 37; but if the evidence is in writing, as where the deed is sent enclosed in a letter, the construction of the writing is for the Judge: *Furness* v. *Meek, ubi sup.*

Possession by grantee, evidence of condition performed.

The possession by the grantee of a deed, delivered to a third person as an escrow until the performance of a condition, is *primâ facie* evidence of the performance of that condition: *Hare* v. *Horton* (1833), 5 B. & Ad. 715; 2 N. & M. 428; 3 L. J. K. B. 41.

It appears to be doubtful whether an escrow can be delivered in terms not to take effect till after the grantor's death: per Coleridge, J., in *Doe* d. *Lloyd* v. *Bennett* (1837), 8 Car. & P. 124; but *quaere* whether this can be relied on.

No further delivery necessary when condition performed.

After the happening of the event or the performance of the condition upon which the delivery was to be made, the escrow operates as a deed without any further delivery, even though the grantor or grantee or both be dead or have ceased to be *sui juris: Perryman's Case* (1598), 5 Rep. 84 a; *Graham* v. *Graham* (1791), 1 Ves. Jr. 272 at p. 274; *Coare* v. *Giblett* (1803), 4 East, 85, at p. 94; *Copeland* v. *Stephens* (1818), 1 B. & Ald. 593 at p. 606; *Frosett* v. *Walshe* (1617), Sir J. Bridgman, 49 at p. 51 (where the grantor, being a *feme sole* when the deed was delivered as an escrow, married before the condition was performed): but an authority to a solicitor to receive the purchase money, implied by his holding the deed, is determined by the death of the grantor: *Newton* v. *Metropolitan Railway* (1861), 10 W. R. 102.

Grantor must have capacity on delivery as escrow.

The grantor, moreover, must have had capacity to execute the deed when it was delivered as an escrow; it is not enough that he

has that capacity when the condition is performed: Shep. Touch. 59; *Butler and Baker's Case* (1590), 3 Rep. 25 a, at p. 35 b; though probably no estate passes till the performance of the condition. See Preston, Shep. Touch. 59, and 3 Prest. Abst. 65, but see *Hooper* v. *Ramsbottom* (1815), 6 Taunt. 12; 1 Marsh. 414; 4 Camp. 121; 4 Cru. Dig. 30.

Equitable relief.

Equity will, of course, relieve against a deed delivered on the faith of others executing it, even if the delivery be complete, and not upon condition if the others fail to execute it. "It is well settled that if two persons execute a deed on the faith that a third party will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two:" per Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121 at p. 125. But such an equity "must be alleged and proved": per James, L.J., in *Ex parte Harding* (1879), 12 Ch. D. 557, at p. 564. Authorities for the proposition are: *Underhill* v. *Horwood* (1804), 10 Ves. 209, at p. 225; *Carew's Case* (1855), 7 D. M. & G. 43 at p. 52; *Evans* v. *Bremridge* (1855), 2 K. & J. 174; (1856) 8 D. M. & G. 100; *Cumberlege* v. *Lawson* (1857), 1 C. B. N. S. 709; 26 L. J. C. P. 120; 5 W. R. 237; and *Bond* v. *Walford* (1886), 32 Ch. D. 238; but in the last case the doctrine above-mentioned was not referred to, and the decision was based upon principles appropriate to cases where marriage settlements are set aside after execution when the intended marriage is abandoned.

Surety.

The question generally arises in cases of suretyship, and the equity "is founded on the sensible principle that a surety is entitled to have the original contract intended by him and all parties carried out:" per Field, J., *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783, at p. 789; *Ward* v. *National Bank of New Zealand* (1883), 8 Ap. Ca. 755; but where A. executed a bond as the joint and several bond of A. and B., having no authority from B., the bond was held the good several bond of A.: *Elliot* v. *Davis* (1800), 2 Bos. & P. 338.

Disclaimer by grantee.

Upon the delivery of a deed the estate thereby granted vests and remains in the grantee unless and until he disclaims: 4 Cru. Dig. 404; Shep. Touch. 284, 285; *Butler and Baker's Case* (1590), 3 Rep. 25a, at p. 26 b; *Swaine* v. *Holman* (1616), Hob. 203; *Smyth* v. *Wheeler* (1671), 2 Keb. 772; *Sir Simon Leech's Case* (1690), Carth. 250; overruling S. C. *sub nom. Thompson* v. *Leach*, 2 Vent. 198; 3 Mod. 296; 1 Show. K. B. 296; 3 Lev. 284; 2 Salk. 618; *Crewe* v. *Dicken* (1798), 4 Ves. 96; *Siggers* v. *Evans* (1855), 5 E. & B. 367;

Mallott v. *Wilson*, [1903] 2 Ch. 494; as the law presumes his assent: 4 Cru. Dig. 9; unless, of course, at the time of delivery he repudiates the delivery and disclaims: per Willes, J., *Xenos* v. *Wickham* (1862), 13 C. B. N. S. 381 at p. 391. It has been doubted whether the doctrine of presumed assent applies to mercantile documents: see per Pollock, C.B., *Xenos* v. *Wickham* (1863), 14 C. B. N. S. 435 at p. 474; and per Willes, J., S. C. (1867), L. R. 2 H. L. 297 at p. 315; though Lord Cranworth, *Ibid.*, at p. 324, said he knew of nothing intermediate between a deed and an escrow.

Disclaimer avoids deed.

Disclaimer avoids the deed *ab initio:* Shep. Touch. by Preston, p. 285: but it is said that a releasee to uses cannot dissent, so as to defeat the uses: Cru. Dig. 4, tit. Deed, c. 12, ss. 47, 48, p. 131; citing *Gorton's Case*, Gilb. Uses, 224, 505 (3rd ed.), and 2 Roll. Abr. 787; but under a modern disentailing deed, where the grant was to the trustees and their heirs, to the use of the trustees and their heirs upon trust for the beneficial owner, it was held that the trustees, being in by the common law, had an estate which they could disclaim: *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17.

No disclaimer after acceptance.

And if the estate is once accepted, it cannot afterwards be disclaimed, and the execution of an indenture by the grantee is evidence of acceptance: 4 Cru. Dig. 404; Shep. Touch. 70; Preston in Shep. Touch. 285; *Edmunds* v. *Edmunds*, [1904] P. 362 at p. 374: the reasons given by the learned Judge for the decision may perhaps be criticised, but the decision that the property passed on the execution of the deed is clearly right.

Release is not disclaimer.

A disclaimer must be an actual disclaimer of all interest; a release cannot be construed as a disclaimer, as it imports an acceptance of the estate thereby released: *Crewe* v. *Dicken* (1798), 4 Ves. 97; *Nicolson* v. *Wordsworth* (1818), 2 Swanst. 365; *Doe* d. *Wyatt* v. *Stagg* (1839), 5 Bing. N. C. 564.

Partial execution.

"It is impossible in law to execute a deed in part only:" per Curiam (Lord Campbell, C.J., and Coleridge, Erle and Crompton, JJ.), *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (1852), 18 Q. B. 728 at p. 731; 21 L. J. Q. B. 327; in which case an averment of execution of a deed except as to a certain clause was held not to be a sufficient allegation of execution: but in a later case it was held that a note, confining the execution by a creditor of a creditor's deed to certain specified debts, could not be treated as a non-execution, but that the executing parties were bound, they having accepted benefits under the deed; Sir R. Collier, in giving the judgment

of the Privy Council, saying: "It is not every attempt by a form of execution to restrain the full operation of a deed which can be treated as a non-execution of it:" *Exchange Bank of Yarmouth* v. *Blethen* (1885), 10 A. C. 293 at p. 299.

Attestation of the signature, sealing or delivery of the deed is not necessary to make a deed as such valid: Co. Litt. 6 a, 7 a, 7 b; Bl. Com. Bk. II. c. 20 (2nd ed., p. 307); *Goddard's Case* (1583), 2 Rep. 4 b at p. 5 a; *Garrett* v. *Lister* (1662), 1 Lev. 25; but of course in practice it should never be omitted, and in the case of many instruments attestation is required by law. Attestation.

Attestation means "that one or more persons are present at the time of the execution *for that purpose*" (*i.e.*, for the purpose of attesting the execution), "and that as evidence thereof they sign the attestation clause, stating such execution:" per Lord Romilly, M.R., *Wickham* v. *Marquis of Bath* (1865), L. R. 1 Eq. 17 at p. 24. The witness must sign as witness and for the purpose of attesting the execution: *Freshfield* v. *Reed* (1842), 9 M. & W. 404; and consequently a party to the deed cannot be a witness: *Coles* v. *Trecothick* (1804), 9 Ves. 234 at p. 251; *Freshfield* v. *Reed* (1842), 9 M. & W. 404; *Wickham* v. *Marquis of Bath* (1865), L. R. 1 Eq. 17; *Seal* v. *Claridge* (1881), 7 Q. B. D. 516. Meaning of attestation.

Directors in whose presence the seal of a corporation is affixed, where the regulations of the corporation require the seal to be affixed in their presence, are not witnesses; they attest the sealing as part of the operation of sealing and not as witnesses. It therefore frequently happens that the deed of a company is not attested within the meaning of the word as ordinarily used, *i.e.*, signed by independent persons for the purpose of recording the fact that the deed was duly executed in their presence: *Shears* v. *Jacob* (1866), L. R. 1 C. P. 513: *Deffell* v. *White* (1866), L. R. 2 C. P. 144. Attestation of seal of corporation.

The importance of an attestation clause is increased by the practice laid down in many cases that when the clause is in the usual form and the signature proved, the jury will be advised to presume sealing and delivery. See Taylor on Evidence (9th ed. s. 149), where many cases are cited; Sug. Pow. (8th ed. p. 232); *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, per Lord Chelmsford, L.C., at p. 320; *Re Sandilands* (1871), L. R. 6 C. P. 411; *Evans* v. *Grey* (1882), 9 L. R. Ir. 539.

The committees of a lunatic who executed a deed for him, put to such deed two seals, and signed their own names. *Held*, a sufficient execution: *Laurie* v. *Lees* (1880), 14 Ch. D. 249; (1881), 7 Ap. Ca. 19; though the proper form in such case is for the committee Execution by lunatic.

to sign the name of the lunatic, adding "by so-and-so, his committee."

Execution by attorney.

"It has been settled, and it is not for us to question the propriety of that decision, that where an attorney describes himself as an attorney, and professes to grant as an attorney and executes as an attorney, but does not execute in the name of and on behalf of his principal, that is a bad execution:" per James, L.J., *Laurie* v. *Lees* (1880), 14 Ch. D. 249 at p. 256.

Personation.

Where a son, being heir-at-law and one of the executors and devisees in trust of his father's will, and having the same name as his father, executed mortgages of freeholds and leaseholds, personating his father and suppressing his father's death and will, it was held that nothing passed by the mortgages as the deeds were forgeries: *In re Cooper, Cooper* v. *Vesey* (1882), 20 Ch. D. 611.

Grantee bound by deed not executed by him.

Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it: Littleton, s. 374; Co. Litt. 230 b, 231 a; Com. Dig. tit. Fait, A 2; Y. B. 8 Edw. IV. (1468) 8 b; *Brett* v. *Cumberland* (1619), 2 Roll. Rep. 63; *Rex* v. *Houghton-le-Spring* (1819), 2 B. & Ald. 375; *Webb* v. *Spicer* (1849), 13 Q. B. 886.

Enrolment.

Any formality, such as enrolment, requisite by statute or at law to make a deed complete, may be completed at any time after the execution of the deed, even after the death of the grantor: Co. 2 Inst. 674, p. 10; *Hall* v. *Winckfeild* (1617), Hob. 195; *Perry* v. *Bowes* (1682), 1 Vent. 360; T. Jones, 196; provided, of course, that such formality is completed within the time limited by the statute or the law: but formalities required, under the terms of an instrument creating a power, for the execution thereof, must be completed during the life of the person executing the power: *Digges' Case* (1600), 1 Rep. 173 a; *Hawkins* v. *Kemp* (1803), 3 East, 410; *Wright* v. *Wakeford* (1812), 4 Taunt. 213; *Doe* d. *Mansfield* v. *Peach* (1814), 2 M. & S. 576; but many such formalities are now rendered unnecessary by the Law of Property Act, 1859 (22 & 23 Vict. c. 35), s. 12.

Indentures and deeds poll.

The distinction between indentures and deeds poll, which is not (as is commonly supposed) the same as the distinction between deeds *inter partes* and deeds not *inter partes*, is not now of any importance, and in fact it appears now to be the practice not to indent modern deeds, and by 8 & 9 Vict. (1845) c. 106, s. 5, indenting a deed is rendered unnecessary. "All deeds are either indented or poll. The deed indented (which is that which is called an indenture), is when the paper or parchment is cut and indented.

. . . And it is defined to be a writing containing a conveyance, bargain, contract, covenants or matter of agreement between two or more [persons;] and is indented in the top or side answerable [in ancient times though not in modern practice] to another that likewise doth comprehend the selfsame matter. And this [instrument] is so called because it is so indented; for albeit it be called an indenture, and begin in these words, *haec indentura*, &c., yet if it be not actually indented, it is no indenture. And on the other side, if it be not so called, or these words be omitted, yet if it be indented, it is an indenture:" Shep. Touch. 50.

Deeds poll.

"The deed poll is that which is plain, without any indenting when the parchment or paper is polled or cut even [or is not intentionally an indenture, though it may not be polled or cut even]:" Shep. Touch. 50.

"These deeds [poll] also are sometimes in the first person as *noveritis, &c., me*, A. B., *&c., dedi et concessi, &c.* [read *dedisse, &c.*]. And albeit it be an indenture so made, yet it is good enough:" Shep. Touch. 51; *Anon.* (1572), 3 Leon. 16. "And sometimes they are made in the third person, as *haec indentura testatur, &c., quod idem* A. B., *&c., dedit et concessit, &c.:*" Shep. Touch. 51.

"The deed poll is usually made in the first person; but if it be made in the third person it is good enough:" Shep. Touch. 51.

Person not a party cannot sue on covenants made with him by deed *inter partes.*

There does, however, appear to be a distinction which is still of importance between deeds made *inter partes* and deeds not so made, for it is a rule of law that no person can sue on a covenant made with him in a deed made *inter partes*, unless he be a party to such deed, and this is the case even if he execute the deed.

In the case of *Scudamore* v. *Vandenstene* (1579), cited in 2 Co. Inst. 673, where one Pitman, not being named among the parties to an indenture, signed, sealed, and delivered the same: the defendant pleaded the release of Pitman; the plaintiff demurred. *Held*, Pitman's release no bar, for he was not a party to the indenture. "And the diversity was taken and agreed betweene an indenture reciprocall betweene parties on the one side and parties on the other side as this was; for there no bond, covenant or grant can be made to or with any that is not party to the deed. But where the deed indented is not reciprocall, but is without a 'between &c.,' as, *omnibus Christi fidelibus, &c.*, there a bond, covenant or grant may be made to divers severall persons."

To the same effect are *Bland* v. *Inman* (1631), 2 Roll. Ab. 450; *Offly* v. *Warde* (1668), 1 Lev. 235; and *Gilby* v. *Copley* (1683), 3 Lev. 138. The same doctrine was discussed in *Lowther* v. *Kelly*

(1723), 8 Mod. 115, and was laid down in the more modern cases of *Storer* v. *Gordon* (1814), 3 M. & S. 308; *Metcalfe* v. *Rycroft* (1817), 6 M. & S. 75; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355; *Lord Southampton* v. *Brown* (1827), 6 B. & C. 718; *Gardner* v. *Lachlan* (1836), 8 Sim. 123 at p. 126; *Ex parte Cockburn* (1864), 33 L. J. Bk. 17 at p. 20; *Chesterfield Colliery Co.* v. *Hawkins* (1865) 3 H. & C. 677.

Unless they relate to tenements or hereditaments.

The statement of Lord Coke in the quotation from *Scudamore* v. *Vandenstene*, *ubi sup.*, that no *grant* can be made to a person not a party to the deed was never true except of grants of immediate estates or interests, and as to such estates and to covenants respecting tenements or hereditaments the law was altered by sect. 5 of the Act to amend the Law of Real Property (8 & 9 Vict. (1845) c. 106), which enacts, "that under an indenture executed after the first day of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken although the taker thereof be not named a party to the same indenture."

Contrà as to deeds not *inter partes*.

The rule never applied except to deeds *inter partes;* a deed poll could always be sued on by any person with whom the covenant was made, and an indenture not *inter partes* is for this purpose a deed poll: *Clement* v. *Henley* (1643), 2 Roll. Ab. 22, Fait, F. 2; *Cooker* v. *Child* (1673), 2 Lev. 74; S. C. *sub nom. Coker* v. *Child*, 3 Keb. 115; *Lucke* v. *Lucke* (1685), Lutw. 110, fo. 302; *Sunderland Marine Insurance Co.* v. *Kearney* (1851), 16 Q. B. 925.

Counterparts.

"All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party:" Shep. Touch. 52; Y. B. 38 H. 6 (1459), 25.

"Although both parts of the indenture are but as one deed yet the part of the grantor is the principal and the other is not but a counterpart, . . . and if there be any difference between the parts, the counterpart shall be made to agree with the principal, and the error shall be deemed the misprision of the clerk:" Shep. Touch. 53.

But the counterpart may be looked at for the purpose of correcting a manifest clerical error in the original; *e.g.*, where by a lease, executed by the lessor only, the property was demised for ninety-four and a quarter years, "yielding and paying therefor during the

said term of ninety-one and a quarter years" a yearly rent, and the counterpart, executed by the lessee only, had ninety-one in the habendum as well as the reddendum, it was *held*, that there being a manifest clerical error in the lease, the counterpart might be looked at for the purpose of ascertaining what the mistake was: *Burchell* v. *Clark* (1876), 2 C. P. D. 88.

Memorial.

So, in Ireland, a memorial, executed by the grantee only, was admitted in evidence to show that interlineations in the original deed, which was produced, were made before execution of the deed: *Brown* v. *Armstrong* (1873), Ir. R. 7 C. L. 130.

CHAPTER II.

ALTERATIONS.

Presumption that alterations made before execution: Material alterations made by a party: Alterations to carry intention into effect: Transfers in blank: Material alterations made by a stranger: Material alterations defined: Immaterial alterations: Fraudulent alterations: Cancellation by accident or mistake: Intentional cancellation of seal.

When a deed is produced for construction it may contain alterations or interlineations, and it is necessary to consider the rules relating to those matters; the first is—

Alterations in deed presumed to be made before execution.

> Alterations and interlineations in a deed are presumed, in the absence of evidence to the contrary, to have been made prior to execution.

"Of ancient time if the deed appeared to be rased or interlined in places materiall, the Judges adjudged upon their view the deed to be voyd. But of latter time, the Judges have left that to the jurors to try whether the rasing or interlining were before the deliverie:" Co. Litt. 225 b, citing *Dr. Leyfield's Case* (1610), 10 Rep. 88 a at p. 92 b.

In the note on this passage in Butler and Hargrave's edition, it is said: "'Tis to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed:" citing *Trowel* v. *Castle* (1661), 1 Keb. 21.

"There is no proof when these words were interlined, or that they were inserted by the direction of the settlor; therefore I must look upon them as if they had been originally incorporated in the body of the deed:" per Reynolds, C.B., *Fitzgerald* v. *Fauconberge* (1730), Fitzgibbons, Rep. 207 at p. 214.

In *Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745 at p. 746, Lord Campbell, C.J., after citing the passage from Coke and Butler and Hargrave's note above quoted, says: "This doctrine seems

to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong."

Rule rests upon principle.

"In the case of deeds, the authorities seem to show that, when there are interlineations, the presumption is that they were made before execution. And this is consistent with good sense; for every deed expresses the mind of the parties at the time of its execution; and so, to alter it afterwards, would be fraudulent, and in many cases highly criminal:" per Lord Cranworth, V.-C., *Simmons* v. *Rudall* (1851), 1 Sim. N. S. 115 at p. 136; and, to the same effect, per Wood, V.-C., *Williams* v. *Ashton* (1860), 1 J. & H. 115 at p. 118.

Clauses added on to deeds.

Clauses written below the testimonium of a deed, but previously to the sealing thereof, will be accepted in law to be parcel of the deed, just as much as clauses written above the testimonium: *Anon.* (1534), Moore, 3, pl. 5; Benloe & Dal. 12, pl. 12; Bendl. 1, pl. 2. The contrary is stated in Brooke's Abridgment, 327, pl. 72, citing Y. B. 1 M. (1554) 1; but this is clearly not law. Thus a memorandum following the testimonium in a deed of covenant was taken as part of the deed: *Thompson* v. *Butcher* (1625), 3 Buls. 300 at p. 302; S. C. *sub nom. Tomson* v. *Butcher*, Bendl. 154; *Lyburn* v. *Warrington* (1816), 1 Starkie, 162, where the indorsement was made after signing, but before sealing and delivery: *Eales* v. *Conn* (1830), 4 Sim. 65, where an agreement was indorsed on a settlement before its execution. A memorandum indorsed on a bond was taken as part of the bond: *Broke* v. *Smith* (1603), Moore, 679; *Burgh* v. *Preston* (1800), 8 T. R. 483; *Keele* v. *Wheeler* (1844), 7 Man. & Gr. 665; 8 Scott, N. R. 323; and a memorandum indorsed on a lease as part of the lease: *Flint* v. *Brandon* (1804), 1 Bos. & P. N. R. 73.

Printed deed altered in writing.

It is worth observing that if a deed of a common nature be in print with additions or alterations in writing, the written words are entitled, "if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects:" per Lord Ellenborough, C.J., *Robertson* v. *French* (1803), 4 East, 130 at p. 136.

Pencil alterations.

"It has been held that the general presumption and probability are, that where alterations (in a will) in pencil only are made, they

are deliberative; where in ink they are final and absolute:" Wms. Exec. Pt. I. Bk. II. c. 2, s. 5. There does not appear to be any authority as to the effect of pencil alterations in deeds, but they would probably be disregarded, whether made before or after execution.

Old rule as to alterations after execution.

With regard to material alterations made after execution the rule, particularly in the older cases, has been often stated as follows: "A material alteration in a deed made after execution renders it void." Thus: "When any deed is altered in a point material, by the plaintiff himself or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void:" *Pigot's Case* (1614), 11 Rep. 26 b; S. C. *sub nom. Winchcombe* v. *Pigot*, 2 Buls. 246; *sub nom. Winscombe* v. *Piggott*, 1 Roll. Rep. 39; *sub nom. Anon.*, Moore, 835.

That they avoid the deed.

"If a deed that is well and sufficiently made in its creation, shall be afterwards altered . . . in any material place . . . be the same either by the party himself that hath the property of the deed, or any other whomsoever, except it be by him that is bound by the deed, [or by his order or consent, for he shall not take advantage of his own wrong,] and be the same with or without the consent of him to whom it is made or doth belong; in this case, and by either of these means, the deed is become void. . . . But if the alteration be made by the party himself that is bound by the deed in any material or immaterial part thereof, or if a stranger without the privity or consent of the owner of the deed shall make any such alteration in any part of a deed not material, . . . hereby the deed is not hurt, but it remaineth good notwithstanding:" Shep. Touch. 68, 69.

"That the alteration in this instrument (a bill of exchange) would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected:" per Lord Kenyon, C.J., in *Master* v. *Miller* (1793), 4 T. R. 320 at p. 329; 2 H. Bl. 140; 1 Sm. L. C. (11th ed.), p. 767.

"The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should

be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration, except through fraud or *laches* on his part:" per Lord Denman, C.J., *Davidson* v. *Cooper* (1844), 13 M. & W. 343 at p. 352, on app. from 11 M. & W. 778; 13 L. J. Exch. 276.

Rule so stated is too wide.

But the rule as thus stated is far too wide. It is probable that the reason why the rule was so stated was that, when an altered deed was declared upon by a plaintiff, the proper plea for a party to the deed, who defended the action on the ground of the deed having been altered, was *non est factum*.

Alteration does not avoid deed.

No case can be found in which a deed, or clause of a deed, which produces its full effect at the instant of execution, such as a conveyance of land, has been prevented from taking effect because the deed was altered after execution.

Deed is not avoided by cancellation.

"Where a thing lies in livery, a deed formerly sealed may be given in evidence relating to it, though the seal be afterwards torn off; for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the deed doth not return back again, though the deed was cancelled; . . . so, if the conveyance was made by lease and release, the uses were once executed by the statute, and they do not return back again by cancelling of the deed:" Gilbert on Evid. (6th ed.), p. 95.

Assignment.

Assignment by commissioners of bankrupts to plaintiffs and S. Afterwards the assignment was cancelled, and another was made to the plaintiffs only. *Held*, that the cancelling of the first assignment did not alter the property, which remained in all three: *Nelthorpe and Farrington* v. *Dorrington* (1672), 2 Lev. 113.

Trust deed.

Decreed that, though a trust deed was cancelled, yet it should not divest the estate of the trustees therein named: *Leech* v. *Leech* (1675), 2 Rep. Ch. 100.

Rent

In *Woodward* v. *Aston* (1676), 1 Vent. 296, the Court said that a rent or other grant was not lost by the destruction of the deed, as a bond or chose in action was. The reporter adds, "*Quaere*, if the party himself cancel it," but the answer is, it would make no difference.

Jointure.

A. made an additional jointure to his wife by voluntary conveyance, which he kept in his own power, and he afterwards cancelled the deed. The wife after his death found the deed, and recovered by virtue of it: *Lady Hudson's Case*, cited by Wright, L.K., *Clavering* v. *Clavering* (1704), 2 Vern. 473 at p. 476; Prec. Ch. 235; 2 Eq. Ca. Abr. 52, pl. 5.

Grant.

"I hold clearly that the cancelling a deed will not divest property

which has once vested by transmutation of possession ; and I would go farther, and say that the law is the same with respect to things that lie in grant:" per Eyre, C.J., *Bolton* v. *Bishop of Carlisle* (1793), 2 Hy. Bl. 259 at p. 263.

"The cancelling of a deed does not revest the property conveyed:" per Holroyd, J., *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672 at p. 677.

Conveyances. In the important case of *Davidson* v. *Cooper* (1843), 11 M. & W. 778, at p. 800, Lord Abinger, C.B., in delivering the judgment of the Court, says: "The moment after their execution, the deeds" [*sc.* of conveyance] "become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds; and the principles laid down in *Pigot's Case* ((1614), 11 Rep. 26 b), would not be applicable. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, there the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover;" but see as to alterations by a stranger, *infra*.

Assignment. An assignment by A. of all his personal property and effects to trustees for the benefit of creditors, was held to have passed the property to the trustees, though the deed purported to have as parties the scheduled creditors of A., and the schedule was added after the execution by A.: *West* v. *Steward* (1845), 14 M. & W. 47 ; distinguishing *Weeks* v. *Maillardet* (1811), 14 East, 568.

"There is no ground for saying that, if a deed be altered in a material part, it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact:" per Lord Campbell, C.J., *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432 at p. 440; and see per Lord Abinger, C.B., *Hutchins* v. *Scott* (1837), 2 M. & W. 809 at pp. 815, 816; *Enthoven* v. *Hoyle* (1853), 13 C. B. 373.

Names. A mortgage in which the christian names of one of the mortgagees was altered was held not to have been avoided: *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.

The mere cancelling of a lease does not, since the Statute of Frauds, operate as a surrender so as to destroy the estate vested in the lessee: *Magennis* v. *MacCullogh* (1714–25), Gilb. Eq. Rep. 235; *Roe* d. *Berkeley* v. *Abp. of York* (1805), 6 East, 86: *Doe* d. *Courtail* v. *Thomas* (1829), 9 B. & C. 288; nor to defeat the right of the lessor to recover rent in an action on the demise; for the rent being incident to the reversion, such an action lay for the reversioner at common law, and is founded, not on the deed, but on the fact of the demise of which the deed is evidence: *Lord Ward* v. *Lumley* (1860), 5 H. & N. 87. See also, as to the old doctrine, *Anon.* (1562), Moore, p. 35, pl. 116; *Miller* v. *Mainwaring* (1634), Cro. Car. 397; W. Jones, 354. Leases.

An altered deed may be given in evidence, even by the person who altered it, to prove any effect produced by it at the instant of execution or any right which existed *aliunde*, and of which it is evidence. Altered deed given in evidence.

Where a settlement was gained under an indenture of apprenticeship, and afterwards the deed was materially altered, it was admitted as evidence to show a settlement gained prior to the alteration: *Littleham* v. *St. Leonards*, cited Co. Rep. by Fraser, vol. 6, p. 48, note B. (note to *Pigot's Case*, 11 Rep. 26 b. at 27 a). To prove a right existing *aliunde*.

A lease of which the term was altered was allowed to be given in evidence to show the terms and conditions on which a tenant who was in occupation under a parol agreement upon the terms of the lease was holding: *Earl of Falmouth* v. *Roberts* (1842), 9 M. & W. 469; *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432 at p. 440. Lease.

Action by a builder on a *quantum meruit* for extras; the defendant was allowed to give in evidence a contract which had been altered by his architect to show that the architect's certificate was a condition precedent to any right of action: *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330. Building contract.

The true rule to be adduced from the cases is—

> If a material alteration by rasure, interlineation or otherwise, be made, after execution, in a deed by, or with the consent of, any party thereto, he cannot as plaintiff enforce any obligation contained in it against any party who did not consent to such alteration.

Person altering deed cannot sue on it.

This rule also applies to instruments not under seal: *Master* v. *Miller* (1791), 4 T. R. 320; (1793) 5 T. R. 367; 2 Hy. Bl. 140; 1 Smith's L. C. (11th ed.), p. 767.

Examples of alterations by plaintiff.

Bond.

The condition of a bond which is erased is not good: Bro. Ab. Faits, pl. 7; see pl. 9 and 11. Where a man was bound in a single obligation, and the obligee added a condition; *semble*, that the obligee could not enforce the obligation, though the alteration was to the advantage of the obligor: (1512), Keilw. 162, pl. 2; 164, pl. 7.

Policy.

Policy of insurance altered by the assured without the consent of the underwriters, as to the time of sailing: *Fairlie* v. *Christie* (1817), 7 Taunt. 416; as to places to be called at: *Forshaw* v. *Chabert* (1821), 3 Brod. & B. 158; *Held*, in each case, that the assured could not recover on the policy. Policy of insurance on a ship executed in printed form, without any specific subject of insurance, and the subject-matter afterwards added in writing; *Held*, that the assured could not recover against underwriters who had not signed the addition: *Langhorn* v. *Cologan* (1812), 4 Taunt. 330; see also *Sanderson* v. *McCullom* (1819), 4 J. B. Moore, 5; S. C. *sub nom. Sanderson* v. *Symonds*, 1 Brod. & B. 426; where the addition was held immaterial; and see, as to alterations in policies, 30 & 31 Vict. (1867) c. 23, s. 10.

Charter party.

Alteration made in a charter-party by the broker, who acted for plaintiff, by adding after the words "to sail on or after the 15th day of March next," the words "wind and weather permitting." *Held*, that the plaintiff could not enforce the charter-party: *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893; 26 L. J. Exch. 153.

Covenant.

M. covenants to deliver to W. by a certain day "the whole of his mechanical pieces as per schedule annexed;" the schedule was annexed by the agent to both parties after the execution of the deed. *Held*, on an action for non-delivery of the articles, that the schedule was a material part of the deed, which was not intelligible without it, and accordingly the defendant succeeded on a plea of *non est factum*: *Weeks* v. *Maillardet* (1811), 14 East, 568.

Creditors' deed.

A deed, registered under sect. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor, a surety, and scheduled creditors; at the time of execution no schedule was affixed, but one was afterwards added by the debtor. *Held*, that he could not afterwards set up the deed: *Sellin* v. *Price* (1867), L. R. 2 Ex. 189.

Release.

Action on a bill of exchange accepted by the defendant; defendant pleaded a release by deed: it appeared that when the plaintiff executed the deed, which was a creditors' deed, there was a blank opposite his name in the schedule of debts, which was afterwards incorrectly filled up by the defendant: the plaintiff replied *non est*

factum and succeeded: *Fazakerly* v. *M'Knight* (1856), 6 El. & B. 795; 26 L. J. Q. B. 30.

Joint and several bond of suretyship by four persons, the liability of two limited to 50*l.* each and of the other two to 25*l.* each, after three had executed, one whose liability was limited to 50*l.* executed, adding "25*l.* only." The obligee accepted such addition. *Held*, he could not sue the other three, and, as the bond was joint and several, he could not sue the fourth obligor: *Ellesmere Brewery Co.* v. *Cooper* [1896] 1 Q. B. 75. Bond.

An alteration made with the consent of all parties, for the purpose of carrying out the intention of the parties at the time of the execution of the deed, does not prevent the person making such alteration from enforcing the deed. Alteration to carry into effect intention of parties.

A comparison of the reports of the two actions of *Markham* v. *Fox*, as cited in *Markham* v. *Gonaston* (1599), Cro. Eliz. 626, and in Moore, 547, brings out the necessity of consent to the alteration very clearly. In the case as cited in Croke, Markham brought an action on a bond against Fox, who successfully defended it on the plea that blanks, namely, the christian name and place of habitation of a person mentioned in the condition, had been filled up after execution, and therefore that it was not his deed. In the report in Moore, it appears that in a subsequent action on the same bond, the plaintiff alleged that the blanks had been filled up *with the consent* of the defendant, and succeeded on demurrer. See the reporter's note in *French* v. *Patton* (1808), 9 East, 351 at p. 354. Filling in blanks.

A deed of revocation, and a new settlement made by that deed, though after the sealing and execution of the said deed blanks were filled up in the said deed, and the said deed not read again to the party nor resealed and executed, yet held a good deed: *Paget* v. *Paget* (1688), 2 Chan. Rep. 410.

A conveyance made by A. of his property to trustees for the benefit of his creditors, the particulars of whose demands were stated in the deed, but a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the deed in A.'s presence and with his assent, was supported on the ground that either it was not a deed till the blank was filled up, and that the filling up of the blank in the presence of A. was equivalent to execution by him, or that it was originally Particulars of debts.

a deed intended to take effect as soon as the blanks were filled up: *Hudson* v. *Revett* (1829), 5 Bing. 368; 2 Moo. & P. 663.

Names.

In cases, where a person nominated by deed as attorney filled up a blank left for his christian name: *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; where a blank left for the date was filled up with a date which the Court assumed to be the true date and to be an immaterial alteration: *Keane* v. *Smallbone* (1855), 17 C. B. 179; the deeds were held valid.

Dates.

Where a mortgage was executed with blanks for the names of the tenants, the date of the deed, and the date of the redemption, all of which were subsequently filled in, it was held that, these being merely formal alterations, and made only for the purpose of completing the expression of the intention of the parties to the deed, already apparent on the face of it, the deed as completed was good: *Adsetts* v. *Hives* (1863), 33 Beav. 52.

Documents not under seal.

The same rule applies to documents not under seal: *Bates* v. *Grabham* (1703), Salk. 444; Holt, 469; *Kershaw* v. *Cox* (1800), 3 Esp. 246; *Byrom* v. *Thompson* (1839), 11 A. & E. 31.

On the same principle the mere filling up of blanks after execution with the consent of all parties does not, but filling them up without such consent does, prevent the person making such alteration from suing on the deed: Pigott on Recoveries, p. 213.

Consent only of parties interested.

Alterations may be material as regards some parties and immaterial as regards others; in cases of this kind the consent of those parties only to whom the alterations are material is required: *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Al. 672; *Hall* v. *Chandless* (1827), 12 Moore, 316; 4 Bing. 123.

New obligor.

The insertion with the consent of all parties of the name of an additional obligor to a bond after execution does not vitiate it: *Zouch* v. *Clay* (1671), 2 Lev. 35; on the ground, apparently, that it operates as a new deed; S. C. 2 Keb. 872; 1 Vent. 185; *Matson* v. *Booth* (1816), 5 M. & S. 223.

But alteration must express intention at time of execution.

But if an alteration be made in a deed, even with the consent of all parties, so as to express an intention which was not the intention of the parties to the deed at the time of the execution thereof, no party can enforce any obligation contained in the deed as it originally stood, because such obligations are vacated: *French* v. *Patton* (1808), 9 East, 351; nor can the document as altered take effect as a deed unless the document is restamped: *Hill* v. *Patten* (1807), 8 East, 373; though the document may be evidence of a contract.

Transfers in blank.

In the cases already treated of, where the blanks were filled up

with consent of all parties, the object was to carry out the contract previously made between the parties; but, on the other hand, where an instrument is executed in the form of a deed, not in pursuance of any previous contract, but with the intention of getting some person to enter into a contract which can be expressed by filling his name into the blanks of the instrument, the instrument, notwithstanding that the blanks may be filled up, is void *as a deed: France* v. *Clark* (1883), 22 Ch. D. 830; (1884) 26 Ch. Div. 257; *Société Générale de Paris* v. *Tramways Union Co., Ltd.* (1884), 14 Q. B. D. 424; S. C. in D. P. *sub nom. Société Générale de Paris* v. *Walker* (1885), 11 Ap. Ca. 20; *Powell* v. *London and Prov. Bank*, [1893] 1 Ch. 610; [1893] 2 Ch. 555; although it may possibly have the effect of showing what was intended to be the contract subsequently entered into between the parties: *Re Barned's Banking Co.* (1867), L. R. 3 Ch. 105; and, if a *deed* is not necessary, may take effect as an instrument in writing: *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273.

Inoperative as deeds.

It is said in Lindley on Companies, Bk. III. c. 4, s. 5 (6th ed.), p. 654: "Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is a common practice in the share market for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on. . . . A *deed* executed by A., and purporting to transfer the property to —— ——, *i.e.*, to nobody, is altogether inoperative as a deed; and consequently, if a shareholder in a company, the shares in which are transferable by deed only, executes a transfer of his shares in blank, he still remains legal owner of the shares, and the holder of the deed acquires no other title to the shares than a right to have them properly transferred, or to have the transferor declared a trustee for them." See *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200; 4 Jur. 769 (which overruled *Texira* v. *Evans* (1774), cited in *Master* v. *Miller* (1791), 1 Anstr. 225 at p. 228); Shep. Touch. 68; *Humble* v. *Langston* (1841), 7 M. & W. 517.

Transfers in blank invalid in equity.

The instrument in blank does not at law transfer the ownership of the shares to which it relates, even as between the vendor and the purchaser; nor does the purchaser, by taking such a transfer, contract any obligation at law to procure himself or any one else to

be registered as a shareholder, or to indemnify the vendor from the consequences of his continuing to be a shareholder as between himself and the company. A deed of transfer with a blank for the name of the transferee, is, as a deed, as invalid in equity as at law; and the shares comprised in it remain in equity as at law the property of the transferor: *Tayler* v. *Great Indian Peninsula Ry. Co.* (1859), 4 De G. & J. 559; *Ex parte Swan* (1859), 7 C. B. (N. S.) 400; *Swan* v. *North British Australasian Co., Ltd.* (1862), 7 H. & N. 603; (1863) 2 H. & C. 175; where the names of the transferees and the description of the shares were fraudulently added after the execution of a transfer in blank by the shareholders; *France* v. *Clark* (1883), 22 Ch. D. 830; (1884) 26 Ch. Div. 257; *Société Générale de Paris* v. *Walker* (1885), 11 Ap. Ca. 20; *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610; [1893] 2 Ch. 555.

Debentures in blank.

On the same grounds debentures issued in blank cannot be filled up with the holder's name so as to make them effectual as deeds: *Enthoven* v. *Hoyle* (1853), 13 C. B. 373; *Re Queensland Land and Coal Co., Davis* v. *Martin*, [1894] 3 Ch. 181.

Amplifying description.

Where the names of both vendor and purchaser are inserted in the transfer, and the description of the subject-matter is merely amplified after execution, but a contract complete in its essential terms is entered into before execution, the blank being left only because the parties are ignorant of the full description of the property, the deed as filled up is binding; but, on the other hand, if no complete contract be made before execution, and the description is wholly wanting, so that the deed passes nothing, the subsequent filling up of a blank by supplying the whole description will not pass the property; so that the distinction seems to be between filling up an immaterial blank, and supplying a description which would be wholly wanting, but for the additions made. But *semble*, even an instrument of the latter class might be supported in equity, but not as a *deed;* see per Lord Cairns, L.J., *In re Barned's Banking Co.* (1867), L. R. 3 Ch. 105, at p. 115.

Distinguishing Weeks v. Maillardet.

The case of *Weeks* v. *Maillardet* (1811), 14 East, 568 (*supra*, where the facts are stated), is not at variance with this rule, because in that case the plaintiff sued on the deed with the schedule, and therefore the Court could not but give judgment in favour of the defendant's plea, *non est factum;* but it by no means follows that the plaintiff would not have succeeded if he had sued on the deed without the schedule; for the schedule was only an enumeration of property, which was perfectly ascertained by the

deed without the schedule—that is, the schedule was an immaterial addition.

Fresh execution not presumed.

As to presuming, if necessary, a fresh execution of the deed after the alterations have been made or the blanks filled, see *Goodright* v. *Straphan* (1774), 1 Cowp. 201; *Hudson* v. *Revett* (1829), 5 Bing. 368; 2 Moo. & P. 663; and *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610; [1893] 2 Ch. 555, discussed *ante*, Chap. I. And as to the necessity for a new stamp see *Bowman* v. *Nichol* (1794), 5 T. R. 537; *Cordwell* v. *Martin* (1807), 1 Camp. 79; *French* v. *Patton* (1808), 9 East, 351; *Knill* v. *Williams* (1809), 10 East, 431; and *Cole* v. *Parkin* (1810), 12 East, 471.

Material alterations made by a stranger do not affect deeds.

> Material alterations made by a stranger, *i.e.*, a person not a party to, or claiming under a party to, the deed, do not prevent any person from enforcing the deed, except a person in whose custody the deed was when the alteration was made.

Objections to exception.

Lord St. Leonards (Sugd. Pow. 603 (8th ed.)) considered that alterations made by a stranger never vitiated the deed, saying that the true ground of the rule is the fraud of the party interested; and he cites *Henfree* v. *Bromley* (1805), 6 East, 309, which was a case of the alteration, not of a deed, but of an award by the umpire after his authority had expired; and in which Lord Ellenborough, C.J., said at pp. 311, 312: "The alteration made by him [the umpire] afterwards was no more than a mere spoliation by a stranger, which would not vacate the award. . . . I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident."

Exception does not rest upon principle.

"It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the parties to it—unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant:" *Hutchins* v. *Scott* (1837), 2 M. & W. 809, per Alderson, B., at p. 814.

It may be added that in Ireland and America it has been held that the act of a stranger will not vitiate a deed: *Swiney* v. *Barry* (1835), 1 Jones' Exch. Rep. 109; *Rees* v. *Overbaugh* (1827), 6 Cowen, 746. But according to *Davidson* v. *Cooper* (1844), 11 M. & W. 778; 13 M. & W. 343; and *The Bank of Hindostan* v. *Smith* (1867), 36 L. J. N. S. C. P. 241, the exception above stated does exist: Taylor on Evidence, ss. 1827–30 (9th ed.); Steph. Dig. Ev.

(5th ed.), Art. 89; but both Taylor and Stephen disapprove such exception: Taylor, *loc. cit.*; Stephen (3rd ed.), Pref., p. xxxvi.

Material alteration defined.

An alteration which, if made before execution, would have affected the position, rights or obligations of any person claiming under the deed, is material; possibly other alterations may be material.

Bills of exchange.

The following have been held to be material alterations in a bill of exchange so as to be a bar to an action thereon:—The alteration of the date so as to accelerate the day of payment: *Master* v. *Miller* (1791–3), 4 T. R. 320; 1 Anstr. 225; 5 T. R. 367; 2 Hy. Bl. 141; 1 Sm. L. C. (11th ed.), p. 767; the alteration of the name of the place of payment: *Tidmarsh* v. *Grover* (1813), 1 M. & S. 735; the addition of a place of payment when the bill was accepted generally: *Cowie* v. *Halsall* (1821), 4 B. & Ald. 197; *Macintosh* v. *Haydon* (1826), Ry. & M. 362; *Calvert* v. *Baker* (1838), 4 M. & W. 417; *Burchfield* v. *Moore* (1854), 3 E. & B. 683; 23 L. J. Q. B. 261; *contrà*, *Trapp* v. *Spearman* (1799), 3 Esp. 57; the addition to a bill, expressed to be for value received, of words stating what the consideration was: *Knill* v. *Williams* (1809), 10 East, 431.

Promissory notes.

A joint and several promissory note signed by two persons cannot be sued on if a third person signs without the consent of the two: *Gardner* v. *Walsh* (1855), 5 E. & B. 83; 24 L. J. Q. B. 285, overruling *Catton* v. *Simpson* (1838), 8 A. & E. 136.

Guarantee.

A guarantee under the hand of the guarantor could not be sued on where the creditor affixed a wafer opposite the guarantor's signature so as to make it appear to be his deed: *Davidson* v. *Cooper* (1843), 11 M. & W. 778; (1844) 13 M. & W. 343; 13 L. J. Exch. 276.

A guarantee cannot be sued on if the names of some of the guarantors are struck out after execution by all: *The Bank of Hindostan* v. *Smith* (1867), 36 L. J. N. S. C. P. 241.

Sale note.

The alteration of a sale note at the instance of the vendors providing for damaged goods, prevents them suing on it: *Powell* v. *Divett* (1812), 15 East, 29.

The addition by the buyer to a sold note on a sale by sample, of words importing that either the sample or the bulk was of the seller's own manufacture, is material and prevents his suing: *Mollett* v. *Wackerbarth* (1847), 17 L. J. C. P. 47; 5 C. B. 181.

Bank note.

The alteration of the number of a Bank of England note discharges the note as between the Bank and an innocent holder for

value: *Suffell* v. *Bank of England* (1881), 7 Q. B. D. 270; (1882) 9 Q. B. D. 555; *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84.

Sureties.

By a bond of suretyship four persons were to be jointly and severally liable as sureties, but the liability of two was to be limited to 25*l.* each, and the liability of the other two to 50*l.* each. After the other three had executed the bond, N., whose liability was to have been 50*l.*, also executed it, but added to his signature "25*l.* only," to which the obligee made no objection. *Held*, that this was a material alteration which prevented the obligee suing the other three sureties, and, as the liability was joint, the fourth surety also: *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75.

Old law as to immaterial alterations.

It was formerly held that even an immaterial alteration made by, or with the consent of the person, for whose benefit it was intended, would render an instrument void: *Pigot's Case* (1614), 11 Rep. 26 b; S. C. *sub nom. Winchcombe* v. *Pigot*, 2 Buls. 246; *sub nom. Winscombe* v. *Piggott*, 1 Roll. Rep. 39; *sub nom. Anon.*, Moore, 835; Shep. Touch. 68, 69. But this is no longer law, and now—

Immaterial alterations disregarded.

> An immaterial alteration made in a deed after execution, by whomsoever made, does not affect the deed, or the rights of any person thereunder.

Immaterial alteration defined.

> An alteration which only expresses something which would have been implied in the deed before the alteration was made is immaterial: *Sanderson* v. *Symonds* (1819), 1 Brod. & B. 426; S. C. *sub nom. Sanderson* v. *McCullom*, 4 J. B. Moore, 5; *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573; 9 B. & S. 607.

Covenant.

An alteration made by the covenantee for the benefit of the covenantor held to be immaterial: *Darcy and Sharpe's Case* (1584), 1 Leon. 282; but see *Anon.* (1512), Keilw. 162, pl. 2; 164, pl. 7.

Bills of exchange.

The insertion of the words "or order" in a bill of exchange by the drawer after the payee has indorsed it does not avoid the bill as between the indorsee and the payee: *Kershaw* v. *Cox* (1800), 3 Esp. 246; *Byrom* v. *Thompson* (1839), 11 A. & E. 31.

Bond.

Bond conditioned to pay 100*l.* by six equal instalments of 16*l.* 13*s.* 4*d.* until the full sum of one pounds was paid; a stranger inserted the word "hundred" between "one" and "pounds." *Held*, that such insertion did not alter the sense, was therefore immaterial, and did not destroy the bond: *Waugh* v. *Bussell* (1814), 5 Taunt. 707.

Award.

Where an umpire's award misrecited the christian name of one of the arbitrators, the award was not vitiated by the alteration by a stranger correcting the misrecital; the mistake was not material, and the stranger's alteration a nullity: *Trew* v. *Burton* (1833), 1 Crompton & M. 533.

Cheque.

The crossing on a cheque made under 19 & 20 Vict. (1856), c. 25, is not a material part of the cheque, therefore if the crossing be erased and the banker pays it, he is not liable to the drawer for so paying it: *Simmonds* v. *Taylor* (1857), 27 L. J. C. P. 45 and 248; (1858) 4 C. B. N. S. 463.

Creditors' deed.

A deed under sect. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor and certain persons named in the schedule as creditors, and all other the creditors of the debtor, and was executed by a majority in number, representing three-fourths in value of his creditors, and was then registered; after registration, the names of two additional creditors were added to the schedule. *Held*, that the alteration was not material, and that, as before registration the necessary number of creditors had executed, the insertion of the names of the two creditors did not affect the validity of the deed: *Wood* v. *Slack* (1868), L. R. 3 Q. B. 379.

Signature erased.

After a deed had been executed, one of the parties drew his pen through his own and another party's signatures; it was admitted that the erasure was made wilfully, and under the impression that it might influence claims to be made *dehors* the deed, but no fraud was intended; the deed contained no grant or covenant by the parties whose signatures were thus erased, and imposed no liability on them; they were simply covenantees. It was held that the erasure was immaterial, and did not avoid the deed: *Caldwell* v. *Parker* (1869), Ir. R. 3 Eq. 519; disapproved in *Suffell* v. *Bank of England*, 9 Q. B. D. 555 at pp. 565, 571 and 572.

Date and consideration inserted.

After execution of a transfer the date and consideration were filled in by the transferee: "I assume (without deciding) that the transfer was a valid and effectual deed:" per Stirling, J., *Roots* v. *Williamson* (1888), 38 Ch. D. 485 at p. 492.

Name altered.

After execution of a mortgage, the name of a mortgagee was altered from "William" to "Edward Thomas," those being the real christian names of the person intended, "William" having been inserted in the deed by inadvertence. *Held*, an immaterial alteration: *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.

Immaterial alterations made fraudulently.

Immaterial alterations fraudulently made by a party to the deed seem to be treated as material: Taylor, Ev. s. 1830 (9th ed.), citing *Sanderson* v. *Symonds* (1819), 1 Brod. & B. 426; S. C. *sub nom.*

Sanderson v. *McCullom*, 4 J. B. Moore, 5; the American case of *Adams* v. *Frye* (1841), 3 Metc. 103; and other cases.

Old law as to cancellation by accident.

According to the old law the cancellation of a deed by accident or mistake prevented it being sued upon: Shep. Touch. 69.

Debt on a bond; defendant pleaded *non est factum*. After plea and before trial, by negligence of one of the clerks (*quaere*, of the Court) who had it in his custody, the seals were eaten off by mice. The jury was charged to find whether it was the deed of the plaintiff at the time of the plea pleaded or not: *Nichols* v. *Haywood* (1545), Dyer, 59 b. Jury found defendant sealed and delivered the bond, but that after issue joined the seal was pulled off; judgment for plaintiff: *Michael* v. *Scockwith* (1588), Cro. Eliz. 120; S. C. *sub nom. Michaell's Case*, Owen, 8, where it appears that there were two obligors and the seal of one was taken from the bond. In these cases it was of course unnecessary to consider when the seal was pulled off, unless pulling it off before issue joined would have been an answer to the action on the deed. But this is no longer law, and now—

Cancellation by accident or mistake.

> The cancellation of a deed by accident or mistake does not affect the deed, or the rights of any person thereunder.

Where the seal was pulled off by a little boy the deed was allowed to be given in evidence: *Anon.* (1625), Latch, 226; Palm. 403.

A certificate of a bishop under the Act of Uniformity (12 Car. II. (1660) c. 17), was produced which had only a small bit of wax upon it. Twisden, J.: "If it was sealed, though the seal be broken off yet it may be read, as we read recoveries after the seal is broken off, and I have seen letters of administration given in evidence after the seal broken off, and so of wills and deeds." Accordingly it was read: *Clerke d. Prin* v. *Heath* (1669), 1 Mod. 11.

"It is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. . . . In any case where the seal is torn off by accident after plea pleaded, the deed is held good" (see 1 Roll. Rep. 40; *Michael* v. *Scockwith* (1588), Cro. Eliz. 120; Owen, 8); . . . "and in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case. . . . The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone:" per Buller, J., *Master* v. *Miller* (1791), 4 T. R. 320 at p. 339.

"I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident:" per Lord Ellenborough, C.J., *Henfree* v. *Bromley* (1809), 6 East, 309 at p. 312.

"If the absence of intention to cancel be shown, the thing is not cancelled:" per Maule, J., *Bamberger* v. *The Commercial Credit* (1855), 15 C. B. 676 at p. 693.

Intentional cancellation of seal of one party.

The intentional cancellation of the seal of one party to a deed, where the parties are severally bound, does not affect the deed *quoad* the other parties; but it is otherwise if they be jointly bound.

Charter-party.

Where in a charter-party indented the covenants on the part of the master and owners of a ship with the merchants were joint, and the covenants on the part of the merchants were several, it was resolved that if the seal of one of the merchants was broken from the deed, it did not avoid the deed, but only against him; but if any of the seals of the master or owners had been broken from the deed, all their covenants would have been defeated. When the covenants are several, they are as several deeds written on the same piece of parchment: *Mathewson's Case* (1598), 5 Rep. 22 b; S. C. *sub nom. Mathewson* v. *Lydiate*, Cro. Eliz. 408, 470, 546.

Joint bond.

Thus, in *Bayly* v. *Garford* (1641), March, 125, where defendant's testator was bound in the bond with two others jointly and severally, and afterwards the seals of the others were eaten with mice and rats, "the Court . . . did strongly incline that judgment ought to be given for the defendant, and their reason was that if the obligee by his act or own *laches* discharge one of the obligors where they are jointly and severally bound, that the same discharges them all; but gave day for the further debating of the case, for that this was the first time it was argued;" and probably in the particular case stated the defendant would have been held bound, as the cancellation was by accident.

Several bond.

Where a bond was several, the cancellation by the obligees of the seal of one obligor discharged him alone: *Collins* v. *Prosser* (1823), 1 B. & C. 682; 3 Dow. & Ry. 112. But where the bond was joint and several, the cancellation of the seal of one obligor was held to discharge all: *Bayly* v. *Garford* (1641), March, 125; *Seaton* v. *Henson* (1678), 2 Show. K. B. Rep. (Leach's ed.) 29; 2 Lev. 220.

CHAPTER III.

EXPRESSED INTENTIONS.

Expressed Intentions only regarded: Deeds to take effect though form used inept: Voluntary Settlements: If Deed capable of taking effect in two ways grantee has election.

THE fundamental rule of interpretation for deeds, as for all instruments, is that—

> To interpret a deed, the expressed intention of the parties must be discovered.

Expressed intentions.

The word "intention" may be understood in two senses, as descriptive either (1) of that which the parties intended to do, or (2) of the meaning of the words that they have employed; here it is used in the latter sense. See the remarks of Lord Wensleydale: *Grey* v. *Pearson* (1857), 6 H. L. C. 61 at p. 106; *Abbott* v. *Middleton* (1858), 7 H. L. C. 68 at p. 114.

Meaning of intention.

In other words, the question to be answered always is, "What is the meaning of what the parties have said?" not, "What did the parties mean to say?" The latter question is one which the law does not permit to be asked; it being a presumption *juris et de jure*, to rebut which no evidence is allowed, that the parties intended to say that which they have said.

In *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145 at p. 160, the following rule was laid down by Staunford, J., for interpreting deeds: "Thirdly, that the words shall be construed according to the intent of the parties, and not otherwise; and here he cited what Bracton saith, '*Carta non est nisi vestimentum donationis*,' and the intent directs gifts more than the words."

"And here first I do exceedingly commend the Judges that are curious and almost subtil, *astuti* (which is the word used in the Proverbs of Solomon in a good sense, when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules

might be wrought out of the act:" per Hobart, C.J., *Clanrickard* v. *Sidney* (1615), Hob. 273 at p. 277.

"As far as it may stand with the rule of law, it is honourable for all Judges to judge according to the intention of the parties, and so they ought to do:" Co. Litt. 314 b.

"The Court cannot understand the true intent of the indenture but only by the words of the indenture;" *Kidder* v. *West* (1684), 3 Lev. 167.

"The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object, to the discovery and effectuating of which, all the rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would be not the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which in the particular case, they are found less technically and correctly, but with equal certainty, to be the signs; can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favour of legal construction. The paramount regard to be had, in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the

Technical words.

Technical meaning.

subject of the instrument, on which the question arises, be one that is not matter of law (over which intention has no control), but depends wholly on the will and act of the party, such as the appointment by a donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention to forms may be required, especially in deeds), but words of purchase and description made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words that he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the Court to adopt the technical sense in opposition to the actual meaning of the party; on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form:" per Plumer, M.R., *Cholmondeley* v. *Clinton* (1820), 2 J. & W. 1 at p. 91.

Technical legal words.

"It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties:" per Abbott, C.J., *Evans* v. *Vaughan* (1825), 4 B. & C. 261 at p. 266.

"The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used:" per Lord Denman, C.J., *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651 at p. 663.

Expressed intention.

"It is quite true, I am not to conjecture or guess at what might have been the intention of the parties; but I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction:" per Lord St. Leonards, *Clayton* v. *Glengall* (1841), 1 Dr. & W. 1 at p. 14.

Whole deed to be considered.

"The general principle—that of construing a deed according to the intention, where by any possibility you can do so—is clear enough:" per Lord Truro, *Mill* v. *Hill* (1852), 3 H. L. C. 828 at p. 850.

"I adopt the observations of Alexander, C. B., in *Colmore* v. *Tyndall* ((1828), 2 Younge & J. 605 at p. 622), that this Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the Court sees an intention clearly and distinctly established by it, it has no difficulty in

Rules of law.

carrying that into effect; subject of course to any rules of law that may be applicable to it, but only qualified to that extent:" per Sir J. Romilly, M.R., *Beaumont* v. *Marq. of Salisbury* (1854), 19 Beav. 198 at p. 206.

Express words.

"The rule of construction . . . has been to adhere as rigidly as possible to the express words:" per Lord Cranworth, C., *Grey* v. *Pearson* (1857), 6 H. L. C. 61 at p. 78.

"The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions:" per Lord Wensleydale, *Monypenny* v. *Monypenny* (1861), 9 H. L. C. 114 at p. 146.

"I apprehend it is a sovereign rule in the construction of all written documents to give effect to the intention of the parties as expressed in the instrument itself and to give effect if possible to every word, or at all events to every provision:" per Byles, J., *Hayne* v. *Cummings* (1864), 16 C. B. N. S. 421 at p. 427.

Meaning of words used.

"I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke. . . . They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used:" per Brett, L.J., *Ex parte Chick, Re Meredith* (1879), 11 Ch. D. 731 at p. 739.

"One must consider the meaning of the words used, not what one may guess to be the intention of the parties:" per Jessel, M.R., *Smith* v. *Lucas* (1881), 18 Ch. D. 531 at p. 542.

Deeds failing to take effect in manner intended.

Words capable of more than one construction are to be construed so as to carry into effect the expressed general intention of the parties: and if owing to some rule of law a deed fail to take effect in the manner expressed, it will, if possible, be construed so as to carry into effect the expressed general intention of the parties.

Deed to be good if possible.

In *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145 at p. 160, the following rules were laid down by Staunford, J., for interpreting deeds: "First, that deeds shall be taken most beneficially for the party to whom they are made; secondly, that a deed shall never be void, where the words may be applied to any intent to make it good;

and upon this he cited Bracton, who saith, '*Benigne faciendae sunt interpretationes instrumenti, ut res magis valeat quam pereat,*' and in another place he saith, '*in re dubiâ.*'"

"A deed that is intended and made to one purpose may enure to another, for if it will not take effect [in] that way it is intended, it may take effect another way; [provided it may have that effect consistently with the intention of the parties]. And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *é converso:*" Shep. Touch. 82; *Chester* v. *Willan* (1669), 2 Wms. Saund. 96 a (notes).

"I shall lay down some general rules and maxims of the law, with respect to the construction of deeds. First, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary. Another maxim is, 'that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible:'" per Willes, C.J., *Smith* d. *Dormer* v. *Packhurst* (1742), 3 Atk. 135 at p. 136; S. C. *sub nom. Parkhurst* v. *Smith*, Willes, 327.

Intention to be effectuated if possible.

"The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention:" per Lord Mansfield, C.J., *Goodtitle* d. *Edwards* v. *Bailey* (1777), 2 Cowp. 597 at p. 600. See to the same effect, per Dallas, C.J., *Solly* v. *Forbes* (1820), 4 Moo. 448 at p. 463.

"I conceive that all deeds are to be construed not only strictly according to their words, but so far as is possible, without infringing any rule of law, in such a way as to effectuate the intention of the parties:" per Pearson, J., *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200, at p. 203.

Deeds construed as covenant to stand seised:

Deeds of the natures following, not taking effect in the manner in which they were intended to take effect have, where there was relationship between the parties, taken effect as covenants to stand seised:—A deed of feoffment without livery: *Walker* v. *Hall* (1677), 2 Lev. 213; *Thompson* v. *Attfield* (1682), 1 Vern. 40; *Doe* d.

Deeds construed as covenant to stand seised;

Milburn v. *Salkeld* (1755), Willes, 674; S. C. *sub nom. Doe* d. *Milbourne* v. *Purchasers, &c.*, 2 Wils. 22; and even where the feoffee to uses was not, but the *cestui que use* was, a relation: *Thorne* v. *Thorne* (1682), 1 Vern. 141 (see the bill at length in 2 M. & W. 512 *n*); *Sleigh* v. *Metham* (1697), Lutw. 242 (Nelson's ed.); *Doe* d. *Lewis* v. *Davies* (1837), 2 M. & W. 503 (*Hore* v. *Dix* (1660), 1 Sid. 25, cit. 2 M. & W. 507, is *contrà*, but is overruled 2 Wils. 79; and *Samon* v. *Jones* (1690), 2 Vent. 318, which was a decision of the House of Lords to the same effect as *Hore* v. *Dix*, was disapproved by Willes, C.J., in *Doe* d. *Milburn* v. *Salkeld* (1755), Willes, 674 at p. 679, and in *Roe* d. *Wilkinson* v. *Tranmarr* (1758), Willes, 682, and by Parke, B., in *Doe* d. *Lewis* v. *Davies* (1837), 2 M. & W. 503 at p. 517); a deed purporting to grant a freehold *in futuro*: *Harrison* v. *Austin* (1688), Carth. 38; Comb. 128 (from the report in Carth. it appears that the case was compromised); *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 253; 3 Atk. 731; *Doe* d. *Starling* v. *Prince* (1851), 20 L. J. N. S. C. P. 223; a release founded on a lease, but void as purporting to grant a freehold *in futuro*: *Roe* d. *Wilkinson* v. *Tranmer* (1758), 2 Wils. 75; S. C. *sub nom. Roe* d. *Wilkinson* v. *Tranmarr*, Willes, 682; a deed of grant: *Sanders* v. *Savile* (1657), cited 3 Lev. 372 and Sir T. Raymond, 48; *Osman* v. *Sheafe* (1693), 3 Lev. 370; S. C. *sub nom. Osmere* v. *Sheafe*, Lutw. 378 (Nelson's ed.), Carth. 307; *Doe* d. *Daniell* v. *Woodroffe* (1849), 10 M. & W. 608; 15 M. & W. 769; 2 H. L. C. 811; a covenant that "he giveth and settleth:" *Doe* d. *Jones* v. *Williams* (1833), 5 B. & Ad. 783; "that if he die without issue he does give and grant:" *Coltman* v. *Senhouse* (1678), 2 Lev. 225; Pollexf. 523; S. C. *sub nom. Coultman* v. *Senhouse*, T. Jones, 105; *sub nom. Colton* v. *Senhouse*, 2 Show, 11, ca. 7; a bargain and sale void for want of a pecuniary consideration: *Tebbe* v. *Popplewell* (1599), 2 Roll. Abr. 786, pl. 1; *Wats* v. *Dix* (1649), Styl. 204; *Crossing* v. *Scudamore* (1673), 2 Lev. 9; 1 Mod. 175; 1 Vent. 137; S. C. *sub nom. Crossing* v. *Skidmore*, 2 Keb. 754, 784; *Baker* v. *Lade* (1690), 3 Lev. 291; Carth. 253; S. C. *sub nom. Barker* v. *Lade*, 4 Mod. 149; *sub nom. Lade* v. *Baker*, 2 Vent. 145; *sub nom. Baker* v. *Lane*, Skin. 315; a release founded on a lease for a year that was lost: *Brown* v. *Jones* (1744), 1 Atk. 188 at p. 191; a surrender void by reason of an intervening estate: *Doe* d. *Wooley* v. *Pickard* (1797), per Lord Kenyon, cited 1 Wms. Saund. 236 f (note); a conveyance made in consideration of an intended marriage, which could not operate as a bargain and sale, because there was no pecuniary consideration, nor as a release, because there was no lease for a year, nor as a confirmation, because

neither of the grantees was in possession, nor as a feoffment, because there was no livery: *Doe* d. *Milburn* v. *Salkeld* (1755), Willes, 674; S. C. *sub nom. Doe d. Milbourne* v. *Purchasers under Assignees of Simpson*, 2 Wils. 22.

as grant at common law:

Deeds of the natures following, not taking effect in the manner in which they were intended, have taken effect as grants at common law:—A grant of a reversion has been effected by a deed of feoffment, which could not operate as a feoffment for want of livery: 2 Roll. Ab. 56, pl. 1; *Knotsford* v. *Eedes* (1599), *Ibid.* pl. 2; *Lucy* v. *Englefield* (1616), *Ibid.* pl. 3; *Doe* d. *Were* v. *Cole* (1827), 7 B. & C. 243; 1 Man. & Ry. 33; by a bargain and sale void for want of enrolment: *Adams* v. *Steer* (1609), Cro. Jac. 210; *Nash* v. *Ash* (1862), 1 Hurl. & Colt. 160; by a bargain and sale enrolled, but incapable of carrying out the intention of the parties by reason of the non-execution of the uses declared thereby: *Haggerston* v. *Hanbury* (1826), 5 B. & C. 101; 7 D. & R. 723, overruling *Denton* v. *Fettiplace* (1587), cit. Cro. Jac. 210; by a release void as creating a freehold *in futuro*: *Goodtitle* d. *Edwards* v. *Bailey* (1777), 2 Cowp. 597; by an appointment void by reason of the non-existence of the power: *Shove* v. *Pincke* (1793), 5 T. R. 124; and see *Perry* v. *Watts* (1842), 3 Man. & Gr. 775.

Where the donee of a power of appointment "*limited and appointed*" by deed, not only the lands the subject of the power, but also other lands, it was held that the words "*limit and appoint*" operated as a grant of the latter lands: *Macandrew* v. *Gallagher* (1874), Ir. R. 8 Eq. 490.

A grant of an easement or profit *à prendre* may be effected by articles of agreement under seal: *Holms* v. *Seller* (1691), 3 Lev. 305; or by a covenant: *Le Countee de Huntington* v. *Le Seigneor Mountjoy* (1582), Moo. 174; 1 And. 307, ca. cccxvii.; S. C. *sub nom. Lord Mountjoye and the Earl of Huntington's Case*, Godb. 17; *sub nom. Earl of Huntington and Lord Mountjoye's Case*, 4 Leon. 147; *Northam* v. *Hurley* (1853), 1 El. & B. 665; *Rowbotham* v. *Wilson* (1860), 8 H. L. C. 348 at p. 362.

as release of land;

A release has been effected by a deed which could not take effect as a feoffment for want of livery, the want of livery being supplied by the possession of a tenant: *Rees* d. *Chamberlain* v. *Lloyd* (1811), Wightw. 123; by a grant, by one joint tenant to another: *Chester* v. *Willan* (1669), 2 Wms. Saund. 96 a; S. C. *sub nom. Chester* v. *Wilson*, 1 Vent. 78; *sub nom. Chester* v. *Willand*, 2 Keb. 641; *sub nom. Chester* v. *Willon*, 1 Sidf. 452; and by one co-parcener to another: Y. B. 10 Edw. IV. (1470) 3 b.

as release of services ;

A release of services has been effected by a confirmation to a tenant of the customary estate freed, &c., from all services except, &c. : *Doe* d. *Reay* v. *Huntingdon* (1803), 4 East, 271.

as release of debt, &c.

A covenant not to sue on a bond is a release, except where the covenant is not to sue for a certain time : *Deux* v. *Jeffries* (1591), Cro. Eliz. 352 ; *Ayloffe* v. *Scrimpshire* (1689), Carth. 63; S. C. *sub nom. Ayliff* v. *Scrimshire,* Holt, 619 ; *Searville* v. *Edwards* (1691), cited 1 Ld. Raym. 420 ; *Lacy* v. *Kinnaston* (1701), Holt, 178 ; 3 Salk. 298 ; S. C. *sub nom. Lacy* v. *Kynaston,* 2 Salk. 575 ; 12 Mod. 415 and 548 ; Holt, 218 ; *sub nom. Lacy* v. *Kinaston,* 1 Ld. Raym. 688 ; *sub nom. Clayton* v. *Kynaston,* 2 Salk. 573 ; 12 Mod. 221 ; *Wilson* v. *Braddyll* (1854), 9 Exch. 718.

as release of power ;

A covenant not to exercise a power operates as a release of the power, whether general : *Isaac* v. *Hughes* (1870), L. R. 9 Eq. 191 ; or special : *Scrope* v. *Offley* (1740), 1 Br. P. C. 276 ; *Green* v. *Green* (1845), 2 Jo. & Lat. 529 ; *Re Chambers* (1847), 11 Ir. Eq. 518 ; *Hurst* v. *Hurst* (1852), 16 Beav. 372 ; *Davies* v. *Huguenin* (1863), 1 H. & M. 730 ; and whether exercisable by will only : *Re Chambers* (1847), 11 Ir. Eq. 518 ; *Davies* v. *Huguenin* (1863), 1 H. & M. 730 ; *Isaac* v. *Hughes* (1870), L. R. 9 Eq. 191 ; or by deed or will : *Green* v. *Green* (1845), 2 Jo. & Lat. 529 ; or by deed only : *Scrope* v. *Offley* (1740), 1 Br. P. C. 276 ; *Hurst* v. *Hurst* (1852), 16 Beav. 372.

as confirmation ;

A father by indenture enrolled, in consideration of his natural affection for his son, bargained and sold, gave, granted, and confirmed the land to him and his heirs. *Held,* that as the son was in possession it might operate by way of confirmation : *Osborn* v. *Churchman* (1607), Cro. Jac. 127.

as bargain and sale ;

"In case when a freehold or inheritance shall pass by deed indented and enrolled, it need not have the precise words of bargain and sale, but words equipollent or which do tantamount, are sufficient (2nd Inst. 672) ; as if a man covenants in consideration of money to stand seised to the use of his son in fee ; if the deed be enrolled, it is a good bargain and sale, and yet there are not any words of bargain and sale, but they amount to so much, as it is held in *Bedell's Case* ((1608), 7 Rep. 40 b). So if a man for money aliens and grants land to one and his heirs, or in tail, or for life, by deed indented and enrolled, it amounts to a bargain and sale, and the land shall pass without any livery and seisin : " *Fox's Case* (1610), 8 Rep. 94 a ; S. C. *sub nom. Smallman* v. *Powys,* 2 Brownl. & G. 291. See also *Taylor* v. *Vale* (1589), Cro. Eliz. 166, where the words were " *dedit et concessit ;* " *Grey and Edward's Case* (1577), 4 Leon. 110, where the word was " *dedit.*"

Where A. by deed indented conveyed as follows: "I the said A. have given, granted, and confirmed for a certain piece of money," without any words, "bargain and sell," the habendum was to the feoffee with warranty against A. and his heirs, and there was a letter of attorney to make livery of seisin; the deed was enrolled within one month after it was made, subsequently the attorney made livery. *Held*, that it operated as a bargain and sale: *Anon.* (1572), 3 Leon. 16.

as feoffment;

Charter of feoffment containing words of bargain and sale only, followed by livery, operated as a feoffment: *Benicombe and Parker's Case* (1584), 1 Leon. 25.

as uses of fine;

The uses of a fine may be declared by a bargain and sale not enrolled, or a feoffment without livery: per Holt, C.J., *Jones* v. *Morley* (1698), 1 Ld. Raym. 288 at p. 291; 12 Mod. 159 at p. 163.

as assignment;

Covenant to transfer a specific part of a sum of money on mortgage within three months after death and to pay interest in the meantime, operated as an assignment: *Brownlow* v. *Earl of Meath* (1840), 2 Ir. Eq. Rep. 383; 2 Dr. & Wal. 674.

as lease;

"Albeit the most usual and proper [mode of] making of a lease is by the words demise, grant, and to farm let, and with an *habendum* for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease. And therefore a lease may be made by the word give betake, or the like. The word *locavit* [hired] also is a good word. And the use in the Exchequer is to make leases by the word *committimus*, which is a good word to make a lease (either by the Crown or a common person: Co. Litt. 45 b). And if A. do but grant and covenant with B. that B. shall enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A. promise to B. to suffer him to enjoy such a piece of land for twenty years this is a good lease for twenty years. So if A. license B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years:" Shep. Touch. 271, 272.

Accordingly, a lease has been created by a covenant with a man that he should enjoy the land for a certain time: 1 Roll. Ab. 847, 848; *Harrington* v. *Wise* (1597), Cro. Eliz. 486; Noy, 57; S. C. *sub nom. Harrington* v. *Wyes*, Moo. 459; *Whitlock* v. *Horton* (1606), Cro. Jac. 91; S. C. *sub nom. Whitlock* v. *Chartwell*, Noy, 14; *Lady Montague's Case* (1612), Cro. Jac. 301; *Tisdale* v. *Essex* (1615), Hob. 34; Moo. 861; 3 Buls. 204; 1 Roll. Rep. 397; *Ponesley* v. *Blackman* (1620), Bridg. 12; *Drake* v. *Munday* (1630), Cro. Car. 207; W. Jo. 231; *Richards* v. *Sely* (1676), 2 Mod. 79; S. C.

sub nom. Richards v. *Ceely*, 3 Keb. 638; per Mansfield, C.J., *Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 283; *Doe* d. *Jackson* v. *Ashburner* (1793), 5 T. R. 163 (*Alderes* v. *Wray* (1619), 2 Roll. Rep. 121, is *contrà*); by a mere license to occupy for a certain time; Y. B. 5 H. VII. (1489), 1; Bro. Ab. tit. Lease, 30; *Hall* v. *Seabright* (1669), 1 Mod. 14; 2 Keb. 561; 1 Sid. 428; *Anon.* (Ca. 51) (1705), 11 Mod. 42; *Right* d. *Green* v. *Proctor* (1768), 4 Burr. 2208; by a covenant to stand seised; *Right* d. *Basset* v. *Thomas* (1763), 3 Burr. 1441, 1446; 1 W. Bl. 446; by a covenant to pay rent followed by entry: *Copley* v. *Hepworth* (1690), 12 Mod. 1; 3 Salk. 108.

Contrà as to lease;

But a lease is not created by a covenant with a man that a stranger shall enjoy land for a certain term: *Littleton and Pernes' Case* (1587), 1 Leon. 136; *Porry* v. *Allen* (1589), Cro. Eliz. 173; S. C. *sub nom. Perryn* v. *Allen*, Owen, 97; *Green* v. *Edwards* (1589), Cro. Eliz. 216; 1 And. 258; 1 Leon. 218; Moo. 297; but see per Mansfield, C.J., *Wright* d. *Plowden* v. *Cartwright* (1757), 1 Burr. 283.

A covenant by the tithe-owner with the land-owner not to take tithes for a certain time was held not to amount to a lease of them: *Brewer* v. *Hill* (1794), 2 Anst. 413.

As agreement for lease;

The cases as to when an agreement for a lease amounts to a lease are collected in Woodfall, c. 5, s. 3 (17th ed., p. 147); the most modern are *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, and *Allhusen* v. *Brooking* (1884), 26 Ch. D. 559; *Swain* v. *Ayres* (1888), 21 Q. B. D. 289; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

As assignment of term;

The words "grant, bargain, sell, and demise" were held to operate by way of assignment of a term in *Marshall* v. *Frank* (1717), Gilb. Eq. R. 143; *Beaumont* v. *Marq. of Salisbury* (1854), 19 Beav. 198.

Where a term had become merged in the inheritance, and the owner of the inheritance "granted, bargained, sold, assigned and set over" the premises for the residue of the original term, it was held that there was a resuscitation of the term by the words *grant*, *bargain*, and *sell*, as well as *assign*: *Denn* d. *Wilkins* v. *Kemeys* (1808), 9 East, 366; *Cottee* v. *Richardson* (1851), 7 Ex. 143; but Shadwell, V.-C., held a contrary opinion in *Law* v. *Urlwin* (1848), 16 Sim. 377 (where the operative word was "assign" only).

As appointment;

A power of appointment among children has been held to be exercised by a feoffment: *Daniel* v. *Ubley* (1626), W. Jo. 137; S. C. *sub nom. Daniel* v. *Upton*, Noy, 80; *sub nom. Daniel* v. *Uply*, Latch,

134; *sub nom. Danyel* v. *Ubley*, Bendl. 178; by a lease and release: *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; 2 Eq. Ca. Ab. 309, p. 13; S. C. *sub nom. Thomlinson* v. *Dighton*, 10 Mod. 31 and 71; by a recital: *Wilson* v. *Piggott* (1794), 2 Ves. Jr. 351, 355; and a power of jointuring has been held to be exercised by a covenant to stand seised: *Stapleton's Case*, cited 1 Vent. 228; *Lady Hastings' Case*, cited 3 Keb. 511; and by lease and release: *Dyer* v. *Awister* (1706), cited 1 P. Wms. 165; S. C. *sub nom. Gier* v. *Ossiter*, cited 10 Mod. 34; a general power of appointment by a recital: *Poulson* v. *Wellington* (1729), 2 P. Wms. 533; 2 Eq. Ca. Ab. 131, pl. 3; by a lease and release: *Snape* v. *Turton* (1637), Cro. Car. 472, W. Jones, 392; *contrà*, *Bramhall* v. *Hall* (1764), Amb. 467; 2 Eden, 220; and a power of appointing new trustees by a recital in a lease to which the donee was a party: *Re Farnell's S. E.* (1886), 33 Ch. D. 599.

On the same principle, deeds not referring to a power have operation as an execution of it. As execution of powers.

An instrument, in order to operate as an execution of a power, "must either refer to the power, or to the property subject to the power, or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power; as, for instance, where a testator gives all his real estate, having no real estate of his own, but having only a power over real estate:" per Wood, V.-C., *Brodrick* v. *Brown* (1855), 1 K. & J. 328 at p. 332.

The same rule applies to statutory powers, as, for instance, to the power of leasing given by the Settled Land Act (1882), 45-46 Vict. c. 38: *Mogridge* v. *Clapp*, [1892] 3 Ch. 382. Statutory powers.

The cases are collected in Sugden on Powers, 289 (8th ed.); Farwell on Powers (2nd ed.), p. 176; it is unnecessary to discuss them at length, as most of them arise on wills. *Cowlishaw* v. *Hardy* (1857), 25 B. 169, is however a case on a deed.

Where the donee of a power has also an interest, and the deed executed by him refers to the power, it operates as an execution of the power; otherwise, it operates on his interest. But where the deed cannot take effect on his interest, it will operate as an execution of the power, even if no reference be made to the power: *Sir Ed. Clere's Case* (1602), 6 Rep. 17 b; S. C. *sub nom. Parker* v. *Sir Ed. Clere*, Moo. 567; *sub nom. Sir Ed. Cleer* v. *Parker* (1602), Cro. Eliz. 877; *sub nom. Sir Ed. Clere* v. *Parker* (1604), Cro. Jac. 31; *Colt and Glover* v. *Bp. of Coventry and Lichfield* (1612) Hob. 140, Where interest and power.

at p. 160; but see *Browne* v. *Taylor* (1626), Cro. Car. 38; Sugden on Powers, 343 (8th ed.); Farwell, Pow. (2nd ed.) 266.

Powers of revocation.

Powers of revocation limited to be exercised by deed have been held to be well exercised, by an indenture executed in accordance with the requirements of the power and containing a covenant to levy a fine to other uses and by fine levied accordingly: *Wigson* v. *Garret* (1675), 2 Lev. 149; by a fine followed by an indenture executed in accordance with the requirements and declaring the uses of the fine: *Herring* v. *Brown* (1688), Carth. 22; 2 Show. K. B. 185; Skin. 35, 52 and 184; reversing 1 Vent. 368 and 371, and Comb. 11.

There is, however, an important exception to this rule for—

Voluntary settlements.

> A voluntary settlement, intended to take effect by transfer, cannot be upheld as a declaration of trust, if the transfer be not completed.

"If the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust:" per Turner, L.J., *Milroy* v. *Lord* (1862), 4 D. F. & J. 264 at p. 274; *Antrobus* v. *Smith* (1806), 12 Ves. 39; *Dillon* v. *Coppin* (1839), 4 M. & C. 647; *Searle* v. *Law* (1846), 15 Sim. 95; *Bridge* v. *Bridge* (1852), 16 B. 315; *Woodford* v. *Charnley* (1860), 28 B. 96; *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340; *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; *Moore* v. *Moore* (1874), L. R. 18 Eq. 474; *Heartley* v. *Nicholson* (1874), L. R. 19 Eq. 233; *Lee* v. *Magrath* (1882), 10 L. R. Ir. 313; *Re Shield*, (1885), 53 L. T. 5.

Election of grantee.

> "When a deed may enure to divers purposes [both taking effect on delivery] he to whom the deed is made shall have election which way to take it, and he may take it that way as shall be most for his advantage:" Shep. Touch. 83.

The rule is stated in the Touchstone without the words in brackets, but it requires the insertion of those words, because, if a deed operates in one manner on delivery, and can only operate in another on a further act being done, it must operate in the former way and the grantee has no election: *Anon.* (1572), 3 Leon. 16; *Haggerston* v. *Hanbury* (1826), 5 B. & C. 501.

"Some words are large and have a general extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c., and it is in the election of the party to use which of these purposes he will. . . . And he to whom such a deed comprehending *dedi*, &c., is made, may plead it as a grant, as a release, or as a confirmation, at his election:" Co. Litt. 301 b.

Sir R. H., seised of a manor, part in demesne, part in copyhold, part in leasehold for years, in consideration of a sum of money, by deed, "demised, granted, bargained, and sold" it for a term of years to commence from his death. *Held*, that the grantees might elect to take by demise at common law, or by bargain and sale under the statute: *Heyward's Case* (1595), 2 Rep. 35 a; to the same effect are *Lennard's Case* (1585), 2 Leon. 192; S. C. *sub nom. Leonard's Case*, 3 Leon. 128; and *Darrell* v. *Gunter* (1629), Sir W. Jones, 206, where the words were "demise, grant, and to farm let."

The King having rent of a manor, of which A. and his wife were jointly seised, for valuable consideration, "gave and granted, remitted, released, and renounced" the rent to the husband and his heirs. *Held*, that the husband might use it as a grant of the rent or as a release of it, at his election: *Anon.* (1572), Dy. 319 b, pl. 16.

CHAPTER IV.

WORDS TO BE CONSTRUED IN LITERAL MEANING.

Words to be taken in Literal Meaning: Technical Words: Evidence Admissible to determine Literal Meaning: Evidence of Circumstances: Foreign Language: Dictionary: Illegible Documents: Words Defined by Statute: Technical Legal Terms: Practice of Conveyancers: Mercantile Contracts.

THE next most important rule for the construction of deeds is—

Words to be taken in literal meaning.

WHEN the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words.

What is literal meaning.

By "*literal meaning*" is intended not necessarily the primary etymological or dictionary meaning, but (1) the meaning usually affixed to the words at the time of the execution of the deed, by persons of the class to which the parties belonged; or (2) the meaning in which the words must have been used by the parties, having regard to their circumstances at the time of execution; or (3) the meaning which it can be conclusively shown that the parties were in the habit of affixing to the words.

Technical words.

The literal meaning of technical words in a deed relating to the art or science in which such words are used is their technical meaning.

Evidence admissible.

Extrinsic evidence is admissible for the purpose of determining the literal meaning of the words used and for no other purpose.

Hence evidence is admissible to show who the parties to the instrument are, the circumstances under which the instrument was

executed, and the meaning which they were in the habit of affixing to any words used.

"As words and phrases of speech are to be expounded and construed as they are generally understood, so it is likewise in particular places; and therefore, if I covenant to convey to another an acre of land in *Cornwall*, the common acceptation of the word 'acre' there amounts to as much as a hundred of other counties, so 'a perch' in *Staffordshire* is as much as twenty perches in some other places, therefore such words must be governed by the common and known acceptation of the people:" per Curiam, *Barksdale* v. *Morgan* (1693), 4 Mod. 185 at p. 186.

A written instrument "is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense:" per Lord Ellenborough, C.J., *Robertson* v. *French* (1803), 4 East, 130 at p. 135.

Trade terms.

Context.

"It is true that Courts ought to expound deeds as well as wills according to the intention of the maker, but it has never been said that a Court is so to frame or alter a deed as may best effectuate the maker's intention. The party is left to execute his own purpose in his own way. He may execute it unskilfully and insufficiently, but if the dispositions which he makes are clear and unambiguous the Court cannot alter them merely because they are ineffectual to the attainment of the proposed end:" per Grant, M.R., *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171 at p. 343.

"This is the first time I have ever known it doubted, whether the estate, and interest, and powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant, I am not construing a legal instrument by the acts of the parties, or by their understanding upon it [as in *Cook* v. *Booth* ((1778), Cowper, 819)]; but, by showing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the House to judge what, in legal construction, was her meaning. And I am not aware that there is any legal authority to exclude the evidence of such circumstances and situation. . . .

Evidence of circumstances.

If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will; and does not the construction vary, in some cases, according to the estate? If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to show what interest I had in the premises? For if I was tenant in fee, he will take an estate for his own life; if I was tenant in tail or for life only, he will take for mine" (Co. Litt. 42 a): per Bayley, J., *Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473 at p. 550. In that case a settlement contained a power to grant leases, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" the power of re-entry inserted into the lease was in case the rent should be unpaid for fifteen days, and there should not be sufficient distress, or in certain other events. *Held*, that evidence was admissible as to the form of the power of re-entry inserted in leases of the estate prior to the settlement: see per Lord Eldon, L.C., S. C. 2 Brod. & Bing. at pp. 602 *et seq.;* 3 Bligh, at pp. 449 *et seq.*

Expressed intention.

"It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention; and I believe the authorities to be numerous and clear (too numerous and clear to make it convenient or necessary to cite them) that, where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations; the first, that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is (*sic; quaere* that the primary meaning is) what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning.

Technical words.

Unexpressed intentions.

"This rule thus explained, implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, and Courts of Law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written. . . . But in proportion as we are removed from the period in which an author writes, we become less certain of the meaning of the words he uses; we are not sure that at that period the primary meaning of the words was the same as now, for by the primary is not meant the etymological, but that which the ordinary usage of society affixes to it. We are also equally uncertain whether at that period the words did not bear a technical or conventional sense; and whether they were not so used by the writer:" per Coleridge, J., *Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at pp. 525, 527.

Evidence of meaning of foreign language:

Technical words.

"I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry), and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written, had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. The authorities in support of this position are *The Attorney-General* v. *The Plate Glass Co.* (1792), 1 Anst. 39; *Goblet* v. *Beechey* (1829), 3 Sim. 24; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; *Richardson* v. *Wilson* (1833), 4 B. & Ad. 787; and *Clayton* v. *Gregson* (1836), 5 Ad. & E. 302. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which this instrument is intended to operate.

Evidence as to circumstances.

"For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the Admission of Extrinsic Evidence, under the Fifth Proposition (p. 53, 3rd ed.; p. 67, 4th ed.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written:" per Parke, B., *Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at p. 555.

Context.

"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

Common meaning of words.

"The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much

an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

Evidence of meaning.

Ancient documents.

Technical words.

"But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded, for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed:" per Tindal, C.J., *Shore* v. *Wilson* (1842) 9 Cl. & F. 355 at p. 565.

Evidence as to intention inadmissible.

"We must apply the ordinary rules of construction. . . . One of these rules is that words are to be construed according to their strict and primary acceptation unless from the context of the instrument and the intention of the parties to be collected from it they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; and subject always to the observation that the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade, or business from its proper and ordinary acceptation:" *Mallan* v. *May* (1844), 13 M. & W. 511 at p. 517.

Context.

"It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the Judge. It is also clear that 'months' denote at law 'lunar months,' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months.' If the context shows that calendar months were intended, the Judge may adopt that construction (*Lang* v. *Gale* (1813), 1 M. & S. 111; *Reg.* v. *Chawton* (1841), 1 Q. B. 247). If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances, according to the intention of the parties (*Beckford* v. *Cruttwell* (1832), 1 Moo. & R. 187; *Mallan* v. *May* (1844), 13 M. & W. 511; *Walker* v. *Hunter* (1845), 2 C. B. 324; *Goldshede* v. *Swan* (1847), 1 Exch. 154; Bacon's Maxims, Reg. 10, and the examples there given). If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that particular sense (*Jolly* v. *Young* (1794), 1 Esp. N. P. C. 186; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; *Grant* v. *Maddox* (1846), 15 M. & W. 737). If the meaning of a word depends upon the usage of the place where any thing under the instrument is to be done, evidence of such usage must be left to the jury (*Bourne* v. *Gatliff* (1844), 11 Cl. & F. 45; *Robertson* v. *Jackson* (1845), 2 C. B. 412). Also the jury may have to give the meaning of some technical words:" per Lord Denman, C.J., *Simpson* v. *Margitson* (1847), 11 Q. B. 23 at p. 31.

Context.

Circumstances.

Trade terms.

Usage.

Technical words.

"The evidence was admissible in this case for the purpose of showing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will, not to modify the expressions of the will, not to affix a sense upon the will which it does not bear, not to tell you what the meaning of the will is, but to tell you what were the circumstances

Circumstances.

in which the testator was when he used those expressions, for the purpose of enabling you to ascertain what meaning he affixed to the expressions that he used, and for no other purpose:" per Lord Brougham, *Drummond* v. *Attorney-General for Ireland* (1849), 2 H. L. C. 837 at p. 862.

Usage.

"In construing such an instrument, you may look to the usage to see in what sense the words were used at that time; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed (*Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at pp. 413 *et seq.*); but to admit evidence to show the sense in which words were used by particular individuals, is contrary to sound principle:" per Lord Campbell, *Ibid.* at p. 863.

Circumstances.

"In *Lady Hewley's Case, Shore* v. *Wilson* ((1842), 9 Cl. & F. 355), and in the later case from Dublin, *Drummond* v. *The Attorney-General* ((1842), 1 Dru. & War. 353, and on appeal (1849), 2 H. L. C. 837), parol evidence was received only to enable the Court to understand and construe the deed under which the trusts existed. The great question in the former case was as to what was the sense in which the words 'godly preachers of Christ's holy gospel' were to be understood in the deed creating the trust, and in the latter the question was in like manner as to the meaning of the words 'Protestant Dissenters.' In both these cases the parol evidence was necessary, in order to enable the Court rightly to understand the deed. Certain words were used which it was necessary to construe, and this could not be done without admitting a great deal of evidence as to the state of religious parties at the time when the deeds were framed. For such a purpose the evidence was most reasonable. It was like the evidence afforded by a dictionary, which enables us to translate a foreign language; or a book of science which gives us the meaning of words of art:" per Lord Cranworth, *Attorney-General* v. *Clapham* (1855), 4 De G. M. & G. 591 at p. 627.

Dictionary.

"The will must be in writing, and the only question is, what is the meaning of the words used in that writing. To ascertain which every part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instrument:" per Lord Wensleydale, *Grey* v. *Pearson* (1857), 6 H. L. C. 61 at p. 106.

Circumstances.

"That which he has written is to be construed by every part of it being taken into consideration according to its grammatical

Circumstances.

construction, and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible to place the Court in the position of the testator:" per Lord Wensleydale, *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823 at p. 876.

"In construing all instruments, you must know what the facts were when the agreement was entered into:" per Jessel, M.R., *Cannon* v. *Villars* (1878), 8 Ch. D. 415 at p. 419.

Technical words.

"In my view the principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention:" per Fry, J., *Holt* v. *Collyer* (1881), 16 Ch. D. 718 at p. 720.

Circumstances.

"I agree that here the Court must not shut its eyes or blindfold itself, but must try to put itself, in order to understand this agreement, in the position as near as it can of the parties making the agreement. That is the rule, as I understand, on the construction of every deed or document, whether it be an agreement, a deed, or a will: the Court has a right to know, and is bound to know, all the material facts which were known to the parties at the time when the agreement, deed, will, or whatever it may be was entered into or made. That is legitimate in all cases for the purpose of construing a written instrument:" per Kay, J., *Hart* v. *Hart* (1881), 18 Ch. D. 670 at p. 692.

Similar observations will be found in *Holloway* v. *Holloway* (1800), 5 Ves. 399 at p. 401; *Sidney* v. *Shelley* (1815), 19 Ves. 352 at p. 366; *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171 at p. 344; (1820), 2 J. & W. 1 at pp. 67, 69, 80; *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Hext* v. *Gill* (1872), L. R. 7 Ch. 699 at p. 705; *Inglis* v. *Buttery* (1878), 3 Ap. Ca. 552 at p. 577; *Tucker* v. *Linger* (1882), 21 Ch. D. 18 at p. 36.

Where parties not *ad idem*.

When evidence has been admitted to show the circumstances in which the instrument was executed, or the meaning which the

parties attached to the words used, it may appear that a word, or description, used in the deed, was used by the parties thereto with different meanings: *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 (where the parties contracted as to the purchase of cotton, "to arrive *ex Peerless*, from Bombay," one party meaning a ship of that name which sailed in October, and the other a ship of that name which sailed in December); *Richards* v. *North London Railway Co.* (1871), 20 W. R. 194 (where the parties were not agreed as to what was properly included in the description of the parcels). In such cases the parties are not *ad idem*, and there is consequently no contract.

Superfluous words.

"I cannot admit that there is any such presumption against fulness or even superfluity of expression, in statutes or other written instruments, as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute or purpose of the instrument is (in general) to be preferred to that which makes them less so. . . . And I adhere to an opinion expressed by myself in the House of Lords more than ten years ago in *Giles* v. *Melsom* ((1873), L. R. 6 H. L. 24 at pp. 33 and 34), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that 'nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous:'" per Lord Coleridge, C.J., *Hough* v. *Windus* (1884), 12 Q. B. D. 224 at p. 229.

Dictionary.

It should be added that the Court may refer to a dictionary for the purpose of ascertaining the meaning of a word: *Matthew* v. *Purchins* (1608), Cro. Jac. 203; *Blandford* v. *Marlborough* (1743), 2 Atk. 542 at p. 545.

Foreign language.

Illegible Documents.

Where the document is written in a foreign language, a translator may be employed; and where the document is so illegible that the Court cannot read it, or written in cypher (*Kell* v. *Charmer* (1856), 23 Beav. 195), the evidence of experts is admissible to determine what were the words employed or meant. It seems that where it is alleged that the document is illegible, it is for the Court, and not for the jury, to decide whether it is illegible; in other words, the Court will not resort to the evidence of experts to decipher the instrument, unless it is unable to do so for itself: *Remon* v. *Hayward* (1835), 2 Ad. & El. 666.

Equivocation.

There is an exception to the rule that evidence of intention is

never admissible, for, as will be seen hereafter, in cases of equivocation, by which is meant cases where the description in the document of a person or thing is equally applicable to several persons or things, direct evidence of intention is admissible to determine which of such persons or things the writer intended to point out by such description.

Meaning of word defined by Act of Parliament.

Where the meaning of a word has been defined by an Act of Parliament, no extrinsic evidence is admissible to show that the parties to the deed used it in any other meaning.

Weights.

In *Noble* v. *Durell* (1789), 3 T. R. 271, a "pound," and in *Hockin* v. *Cooke* (1791), 4 T. R. 314, a "bushel," were held to be the statutory pound and bushel; and see *R.* v. *J. Major* (1792), 4 T. R. 750.

Measures.

In *The Master and Brethren of St. Cross* v. *Lord Howard de Walden* (1795), 6 T. R. 338, it was held that the reservation in a lease of so many quarters of corn must mean quarters as defined by the Act of Parliament, and not customary quarters.

Feast days.

In *Doe* d. *Spicer* v. *Lea* (1809), 11 East, 312, evidence was not admitted to show that by the words "the feast of St. Michael" was meant Old Michaelmas Day, though, as was pointed out by the Court, intrinsic evidence might have been used for that purpose.

"Acre."

In *O'Donnell* v. *O'Donnell* (1878), 1 L. R. Ir. 284, and on appeal (1882), 13 L. R. Ir. 226, "acre" was held to be the statutory acre, and "if one sells land and is obliged that it containeth twenty acres this shall be according to the law and not according to the custom of the country:" per Gawdy, J., *Wing* v. *Earle* (1592), Cro. Eliz. 267. See 1 Smith's Leading Cases, p. 569 (11th ed.), notes to *Wigglesworth* v. *Dallison*.

Nor will evidence be admitted on an indictment to show that a word used in a statute relating to a trade may be interpreted according to the meaning borne by the word in the trade: *Attorney-General* v. *Cast-Plate Glass Co.* (1792), 1 Anst. 39, where the Court held with regard to glass that "squared" meant cut in any rectangular shape but not necessarily in a shape having equilateral sides, but refused to admit evidence of a trade usage by which "squared" meant "shaped for sale," the question being whether the defendants had complied with the statutes when they cut the glass plates with rounded sides.

In the application of the rule to the interpretation of deeds containing technical legal terms, since the draftsman probably used those terms in their technical meanings, such meanings must be affixed to them unless excluded by the context. Technical legal terms.

The rule is applied to the construction of Acts of Parliament: *Laird* v. *Briggs* (1881), 19 Ch. D. 22; and to wills.

In *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823, Lord Wensleydale, in laying down the rules for the interpretation of wills, which do not appear to differ in this respect from those employed for deeds, says (at p. 877): "It is another and most important rule in the construction of the words used in a will that technical terms, or words of known legal import, must have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is."

"The will is confessedly not the natural language of the testator himself, but the professional language of the conveyancer who was employed to draw it. Surely it is difficult to maintain that in construing such a will the same sense ought to be imputed to its language as if the subject of construction were a document of an ordinary kind, framed in natural language, and treating of untechnical matters:" per Williams, J., *Thellusson* v. *Rendlesham* (1859), 7 H. L. C. 429 at p. 486. Language of conveyancers.

"We must attach some meaning to the word ('seised'), and if we are not to take the proper meaning, but some other meaning, what other meaning is it to be? If we are to guess at the meaning which the testatrix attached to the word, where are we to stop? Therefore, it seems to me that the word must either be meaningless, or else must have its proper technical meaning:" per Bramwell, L.J., *Leach* v. *Jay* (1878), 9 Ch. D. 42 at p. 45. "Seised."

"The rule is to adopt the legal and technical meaning of the word unless it is controlled by the context:" per Jessel, M.R., *Smith* v. *Butcher* (1878), 10 Ch. D. 113 at p. 114.

"As regards our duty when wills come before us for construction it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary

intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. . . . We must therefore construe the will as we should construe any other document:" per Cotton, L.J., *Ralph* v. *Carrick* (1879), 11 Ch. D. 873 at p. 878.

Evidence as to meaning of technical legal terms inadmissible.

It must be remembered that, as the Judge before whom the case is being argued is able, and is the only person authorised, to give an authoritative declaration of the law applicable to it, no evidence is admissible as to the meaning of the technical legal words employed other than decisions of other Judges.

Text-books.

Some few old text-books are also considered as being of authority, and the Judges are in the habit of paying attention to the practice of conveyancers.

Practice of conveyancers.

"It has been sometimes said *communis error facit jus;* but I say *communis opinio* is evidence of what the law is: not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the groundwork and substratum of practice upon which powers of this sort have been erected and acted upon from the time of 32 Hen. VIII. down to the present time; all of which have been framed under the supposition that the various covenants which the author of the power prescribed were capable of being enforced. For what purpose can we suppose that persons conversant in drawing wills and family settlements have gone on prescribing those terms where no one term and no one covenant except that for payment of rent could be enforced:" per Lord Ellenborough, C.J., *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382 at p. 396.

"I put this case on the practice of conveyancers, and after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice:" per Lord Eldon, C., *Howard* v. *Ducane* (1823), 1 T. & R. 81 at p. 87; and see his remarks in *Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473 at p. 599; S.C. *sub nom. Smith* v. *Earl Jersey* 3 Bligh, P. C. 290 at p. 444; and the remarks of Erle, C.J., in *Heelis* v. *Blain* (1864), 18 C. B. N. S. 90 at p. 108.

"The settled practice of conveyancers is to be looked upon as part of the common law:" per James, L.J., *In re Ford and Hill* (1879), 10 Ch. D. 365 at p. 370. "I agree with the Vice-Chancellor that the practice of conveyancers, although it does not decide the

point, is not wholly irrelevant" (in construing deeds): per Jessel, M.R., *In re Athill, Athill* v. *Athill* (1880), 16 Ch. D. 211 at p. 223, and see per Byrne, J., *Hollis Hospital and Hague's Contract* [1899], 2 Ch. D. 540 at p. 551; but "although I respect the practice and opinions" of conveyancers "greatly, I am not at liberty to regard them as the law," per Bacon, V.C., *Anson* v. *Potter* (1879), 13 Ch. D. 141 at p. 143; and in *Mason* v. *Ogden*, [1903] A. C. 1, "upon counsel for the respondents urging that a reversal of the decision below would upset the practice of conveyancing, the Earl of Halsbury, L.C., observed that if necessary he should have no hesitation in upsetting that practice: as the reader will see it was not necessary:" *Ibid.* p. 2.

Mercantile contracts.

The rule that technical words must bear their technical meaning in instruments relating to the art or science to which they belong, is of the greatest importance in the interpretation of mercantile contracts, the rule as to which appears to be laid down correctly by the learned authors of Manning and Granger's Reports, in the note to *Lewis* v. *Marshall* (1844), 7 Man. & Gr. 729 at p. 745, viz.:—

Rule as to mercantile contracts.

> In construing a *usual* mercantile contract, the question is, in what sense have the terms been used in similar contracts? In the case of an *unusual* contract, have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade?

"On the present occasion, the question was, whether there was a recognised practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

Usage.

"The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses; for the contract may be safely and correctly interpreted by reference to the fact of usage; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge:" per Tindal, C.J., *Lewis* v. *Marshall* (1844), 7 Man. & Gr. 729 at p. 744.

"Mercantile contracts are very commonly framed in a language peculiar to merchants: the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large: evidence, therefore, of mercantile usage and custom is admitted in order to expound it and arrive at its true meaning. . . . In the construction of a contract among merchants, tradesmen or others, the evidence will not be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that:" per Coleridge, J., *Brown* v. *Byrne* (1854), 3 El. & Bl. 703 at p. 715.

Mercantile usage and custom.

"The duty of the Court, or of an arbitrator who is in the place of the Court, is so to construe a contract as to give effect to the intention of the parties. Now, although parol evidence is not admissible to contradict a contract, the terms of which have but one ordinary meaning and acceptation, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary and not according to their peculiar signification. Therefore, whenever such a question has come before the Courts, it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar and scientific meaning, the parties who have drawn up the contract with reference to some peculiar department of trade or business, must have intended to use the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties. And from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of parol evidence:" per Cockburn, C.J., *Myers* v. *Sarl* (1860), 3 El. & El. 306 at p. 315.

Trade terms.

"Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted

Usage.

and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed is ambiguous or unambiguous; but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning:" per Hill, J., *Ibid.* at p. 318.

"I agree with my brother Hill that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *primâ facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning; which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . That I take to be the true rule of law upon the subject; that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is, *primâ facie*, to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail:" per Blackburn, J., *Ibid.* at p. 319.

Trade terms.

"The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to any of the words of that contract, has to place the construction upon the contract. . . . Now having submitted to your Lordships what I understand to be the natural and literal meaning of this contract, I ask how is that natural meaning to be got rid of? My Lords, I conceive in this way, and only in this way. It was of course competent for those who were resisting the application of this natural construction of the contract, to have said: 'We will prove by evidence that according to the custom of the trade, these words, which have this natural signification, are used in a wider or in a different sense.' . . . That of course would, according to the well-known rule of law which admits parol evidence, not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used. That would be a legitimate and well-known mode of construing the document:" per

Custom of trade.

Lord Cairns, L.C., *Bowes* v. *Shand* (1877), 2 Ap. Ca. 455 at pp. 462, 468.

Examples.

Examples of cases in which evidence has been admitted to explain technical words :—

Building contract.

In a building contract : "per superficial yard of work nine inches thick :" *Symonds* v. *Lloyd* (1859), 6 C. B. N. S. 691 ; "weekly account :" *Myers* v. *Sarl* (1860), 3 El. & El. 306.

Charter-party.

In a charter-party : "month :" *Jolly* v. *Young* (1794), 1 Esp. N. P. C. 186 ; "in turn to deliver :" *Robertson* v. *Jackson* (1845), 2 C. B. 412 ; "in regular turns of loading :" *Leidemann* v. *Schultz* (1853), 14 C. B. 38 ; see also *Hudson* v. *Clementson* (1856), 18 C. B. 213 ; "in regular turn :" *Lawson* v. *Burness* (1862), 1 H. & C. 396 ; "port :" *Sailing Ship "Garston" Co.* v. *Hickie & Co.* (1885), 15 Q. B. D. 580.

Sport.

In a contract relating to sport : "across country :" *Evans* v. *Pratt* (1842), 3 Man. & Gr. 759 ; "P. P. :" *Daintree* v. *Hutchinson* (1842), 10 M. & W. 85.

Theatrical agreement.

In a theatrical agreement : "three years :" *Grant* v. *Maddox* (1846), 15 M. & W. 737.

Service.

In a contract of service : "to serve from 11th November next until 11th November, 1817" (the evidence was to show that certain holidays were allowed) : *Reg.* v. *Inhabitants of Stoke-upon-Trent* (1843), 5 Q. B. 303 ; "the same ground" (the servant being a commercial traveller) : *Mumford* v. *Gething* (1859), 7 C. B. N. S. 305.

Contract for sale.

In a contract for sale : "mess pork of Scott & Co." (to show that this meant manufactured by Scott & Co.) : *Powell* v. *Horton* (1836), 2 Bing. N. C. 668 ; "sold 18 pockets Kent hops at 100*s*." (to show that the price was meant to be 5*l*. per cwt.) : *Spicer* v. *Cooper* (1841), 1 Q. B. 424 ; "good" and "fine" barley : *Hutchinson* v. *Bowker* (1839), 5 M. & W. 535 ; "bale" of gambier (to show that by usage it meant a package of a particular description) : *Gorrissen* v. *Perrin* (1857), 2 C. B. N. S. 681.

Leases.

In a lease of a rabbit warren : that by custom of the country "one thousand rabbits" means 1,200 : *Smith* v. *Wilson* (1832), 3 B. & Ad. 728.

In a lease of "warren of conies" : *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798 at p. 834.

In an agreement for an agricultural lease : "mines and minerals" : *Tucker* v. *Linger* (1882), 21 Ch. D. 18 ; (1883), 8 App. Cas. 508.

In a mining lease : "level" : *Clayton* v. *Gregson* (1836), 5 Ad. & El. 302.

Policy of Insurance.

In a policy of insurance on a ship: to show whether the words "the East Indies, East India Islands," included the Mauritius: *Robertson* v. *Clarke* (1824), 1 Bing. 445.

In an open policy on freight: that "freight" meant by usage the gross, and not the net amount of the freight: *Palmer* v. *Blackburn* (1822), 1 Bing. 61.

Bill of lading.

In a bill of lading: "freight for the said goods five-eighths of a penny sterling per pound, with five per cent. primage and average accustomed," to show that by custom three months' interest or discount is deducted from freights payable under bills of lading on goods coming from certain ports: *Brown* v. *Byrne* (1854), 3 El. & Bl. 703. "Freight at the rate of 80*s*. per ton of 20 cwt., gross weight, tallow, other goods, grain, or seed, in proportion, as per London Baltic printed rates:" *The Russian Steam Navigation Co.* v. *Silva* (1863), 13 C. B. N. S. 610.

Underwriting contract.

In a contract to take shares: "underwrite" and "discount:" *Re Licensed Victuallers' Mutual Trading Association, Ex parte Audain* (1889), 42 Ch. D. 1.

The cases in which evidence of custom has been admitted (*a*) to explain the meaning of terms usual in a contract, and (*b*) to ingraft stipulations on to the written contract, which second proposition is discussed *infra* in Chapter 8, are collected in the notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. 545; in Taylor on Evidence, pt. iv. c. iv.—(*a*) ss. 1162 *et seq.* (pp. 763 *et seq.*, 9th ed.), and (*b*) ss. 1168 *et seq.* (pp. 767 *et seq.*, 9th ed.); and in Roscoe's Nisi Prius Evidence, pp. 22 *et seq.* (17th ed.).

Statement of the above rules applied to wills by Wigram, V.-C.

The preceding rules in this chapter are co-extensive with the 2nd, 3rd, 5th, and 6th propositions laid down for the interpretation of wills in Wigram on Extrinsic Evidence, namely:—

"Proposition 2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

"Proposition 3. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and

primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable."

"Proposition 5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."

"Proposition 6. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases*) will be void for uncertainty."

The above propositions will be found in the 3rd ed. at pp. 17, 42 and 51, and in the 4th ed. at pp. 18, 56, 65, and 94.

CHAPTER V.

DEED TO BE CONSTRUED AS A WHOLE.

Deed to be Construed as a Whole: Context: Series of Deeds: Repugnant Clauses: Repugnant Words Rejected: Omitted Words Supplied: Words Transposed: Parentheses Inserted: False Grammar: Incorrect Spelling.

Of course every deed must be construed as a whole, and—

> Where the literal meaning of a word is excluded by the context, there must be affixed to the word such of the meanings that it properly bears as will enable a uniform and consistent intention to be collected from every part of the deed.

Literal meaning excluded by context.

The application of this rule is often called applying intrinsic evidence.

Intrinsic evidence.

"In every deed a reasonable intention shall be construed, though the words sound to a contrary meaning:" *Bold* v. *Molyneux* (1536), Dyer 14 b at p. 15 a.

"Every part of the deed ought to be compared with the other and one entire sense ought to be made thereof:" per Staunford, J., *Throckmerton* v. *Tracy* (1555), 1 Plow. 145 at p. 161.

"The word (*appertaining* to the messuage) shall be here taken in the sense of *usually occupied* with the messuage or *lying* to the messuage, for when *appertaining* is placed with the said other words it cannot have its proper signification . . . and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with* or *lying to*, *ut supra*, and being placed with the said other words it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense it is the office of Judges to take and expound the words which common people use to express their meaning, according to their

"Appertaining."

meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it:" per Curiam, *Hill* v. *Grange* (1556), 1 Plow. 164, at p. 170.

Entire deed.

"Every deed ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only:" per Hobart, C.J., *Trenchard* v. *Hoskins* (1624), Winch, 91 at p. 93.

It is a rule that the construction of a deed "be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus et consequentibus est optima interpretatio:* for *turpis est pars quae cum suo toto non convenit. Maledicta expositio quae corrumpit textum:*" Shep. Touch. 87.

General frame of deed.

"*Qui haeret in litera haeret in cortice*, especially in the case of trusts, which are to be ruled and governed according to the intent of the parties, where such intent is consistent with the rules of law; and the Court will, from the general frame of a testament or settlement, collect the intent, contrary to the express words of a particular clause:" per Henley, L. K., *Earl of Northumberland* v. *Earl of Egremont* (1759), 1 Ed. 435 at p. 446; citing *Coryton* v. *Helyar* (1745), 2 Cox, 340, where an absolute term of ninety-nine years limited to J. C., amongst other limitations of real estate in a will, was cut down on the construction of the whole will to a term determinable on the death of J. C.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus;* every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done:" per Lord Ellenborough, C.J., *Barton* v. *Fitzgerald* (1812), 15 East, 530 at p. 541.

Whole deed to be read.

"In the construction of all instruments it is the duty of the Court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a Court is not authorised to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious

may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it be plainly controlled by other parts of the instrument:" per Leach, V.-C., *Hume* v. *Rundell* (1824), 2 S. & S. 174 at p. 177.

"If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds appearing upon the face of the instrument affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention:" per Lord Cottenham, L.C., *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192 at p. 202.

Key furnished by parties.

"It is said, the terms used in the deed are terms of art which have a definite legal meaning and must be construed accordingly. But assuming that to be so, it is certain that the context may show that they are not used in that sense. The word 'son' has a definite legal meaning—namely, legitimate son—but if in a deed it appeared a person was speaking of his illegitimate children, it is clear the word 'son' might mean an illegitimate son:" per Bramwell, B., *Monypenny* v. *Monypenny* (1858), 4 K. & J. 174 at p. 182.

"Son."

Observations to a like effect will be found in:—*Lee* v. *Brace* (1696), 12 Mod. 101, per Holt, C.J.; Carth. 343; 3 Salk. 337; Holt, 668; *Fisher* v. *Wigg* (1700), 1 P. Wms. 14, per Gould, J.; *Butler* v. *Duncomb* (1718), 1 P. Wms. 448, per Parker, L.C., at p. 457; *Hodgeson* v. *Bussey* (1740), 2 Atk. 89, per Hardwicke, L.C., at p. 90; S. C. *sub nom. Hodgson* v. *Bussy*, Barn. Ch. Rep. 195; *Parkhurst* v. *Smith* (1742), Willes, 327, per Willes, C.J., at p. 332; S. C. *sub nom. Smith* v. *Packhurst*, 3 Atk. 135 at p. 136; *Wright* v. *Kemp* (1789), 3 T. R. 470, per Kenyon, C.J., and Ashurst, J., at pp. 472, 473; *Woodcock* v. *Duke of Dorset* (1792), 3 Bro. C. C. 569, per Thurlow, L.C., at p. 570; *Payler* v. *Homersham* (1815), 4 M. & S. 423, per Ellenborough, C.J., at p. 426; *Solly* v. *Forbes* (1820), 4 Moore, 448, per Dallas, C.J.; *Lansdowne* v. *Lansdowne* (1820), 2 Bligh, 60, per Eldon, L.C., at p. 88; *Cholmondeley* v. *Clinton* (1820), 2 J. & W. 1, per Plumer, M.R., at p. 89; *Monypenny* v. *Monypenny* (1859), 3 De G. & J. 572, per Chelmsford, L.C., at p. 588; *Hext* v. *Gill* (1872), L. R. 7 Ch. 699, per Wickens, V.-C., at p. 705, n.; *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. 264,

per Jessel, M.R., at p. 270; *Laird* v. *Briggs* (1881), 19 Ch. D. 22, per Jessel, M.R., at p. 34; and *Tucker* v. *Linger* (1882), 21 Ch. D. 18, per Jessel, M.R., at p. 36.

"Month."

Thus, though "in temporal matters" *month* means lunar month, it may be shown by the context to mean calendar month: *Lang* v. *Gale* (1813), 1 M. & S. 111; *Reg.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; *Simpson* v. *Margitson* (1847), 11 Q. B. 23.

Contemporaneous deeds to be read together.

If the transaction between the parties is contained in more than one deed, all the deeds must be construed together, and one may be read to explain the others.

"The law neither sees nor regards any time but the time of the first agreement, notwithstanding divers assurances be in different times and all but to perfect one assurance, and by construction of law they shall all be said to be made at one and the same time; otherwise you may shake all assurances:" per Mountague, C.J., *Havergil* v. *Hare* (1617), 3 Buls. 250 at p. 256.

Lease and release.

"The lease and release are but in nature of one deed:" per North, C.J., *Barker* v. *Keat* (1677), 2 Mod. 249 at p. 252.

Fine and recovery.

"For at law a fine and recovery and deed to lead the uses are but one conveyance:" per Holt, C.J., *Mountague* v. *Bath* (1693), 2 Rep. in Ch. 417 at p. 434.

"And the deed, the fine and the recovery may well be taken as several parts of one and the same conveyance:" per Trevor, C.J., *Abbot* v. *Burton* (1708), 11 Mod. 181 at p. 184; 2 Salk. 590 at p. 591.

Series of deeds.

"When documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed: and of course one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose:" per Jessel, M.R., *Smith* v. *Chadwick* (1882), 20 Ch. D. 27 at p. 62; and *Anderson's Case* (1877), 7 Ch. D. 75 at p. 98, where the articles of association of a company were read to explain the memorandum; *Re Capital, &c., Association* (1882), 21 Ch. D. 209 at p. 212.

Memorandum and articles.

This rule applies whether the deeds be executed simultaneously:

Anon., cited by Doddridge, J., in *Thurman* v. *Cooper* (1618), 2 Roll. Rep. 23; *Gale* v. *Williamson* (1841), 8 M. & W. 405; *Harman* v. *Richards* (1852), 10 Hare, 81; *Hopgood* v. *Ernest* (1865), 3 De G. J. & S. 116; and *Edwards* v. *Marcus*, [1894] 1 Q. B. 587; or at different times: *Lord Cromwel's Case* (1601) 2 Rep. 69 b. at p. 75 a; *Havergill* v. *Hare* (1618), Cro. Jac. 510; S. C. *sub nom. Havergall* v. *Hare*, Pop. 147; *sub nom. Havergil* v. *Hare*, 3 Buls. 250; *Farrowes* v. *Farmer* (1622), 2 Roll. Rep. 245; S. C. *sub nom. Ferrers* v. *Fermor*, Cro. Jac. 643; *King* v. *Edwards* (1633), Cro. Car. 320; *Snape* v. *Turton* (1637), Cro. Car. 472; *Wigson* v. *Garret* (1675), 2 Lev. 149; S. C. *sub nom. The Earl of Leicester's Case*, 1 Vent. 278; *Addison* v. *Otway* (1677), 2 Mod. 233; *Herring* v. *Brown* (1687), Carth. 22 (reversing 2 Show. 185; 1 Vent. 371; Comb. 11; Skin. 184); *Jones* v. *Morley* (1697), 1 Ld. Raym. 287; 12 Mod. 159, where the question is discussed how far the uses of a fine may be varied before the fine is levied; *Hurd* v. *Fletcher* (1778), 1 Doug. 43; *Duke of Bolton* v. *Williams* (1793), 2 Ves. Jr. 138, where it was held that all the instruments securing an annuity form but one assurance, so that if the memorial is defective as to one it vitiates the whole; *Fowler* v. *Hunter* (1829), 3 Y. & J. 506; *Ford* v. *Stuart* (1852), 15 Beav. 493; *Whitbread* v. *Smith* (1854), 3 D. M. & G. 727; and Viner Abr. tit. "One Entire Conveyance." And they will be presumed to have been executed in that order which will enable the intent of the parties to be carried into effect; whether they be executed simultaneously: *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60 at pp. 106 and 107; 2 Sm. L. C. p. 575; *Doe* d. *Atkyns* v. *Horde* (1777), Cowp. 689 at p. 699; *Gartside* v. *Silkstone, &c. Co.* (1882), 21 Ch. D. 762; or not: *Selwyn* v. *Selwyn* (1761), 2 Burr. 1131; 1 Bl. Rep. 222 and 251, where it was held that land would pass by a will executed after the deed to lead the uses of a recovery, and before the recovery suffered.

Whether executed at one time: or at divers times.

Order of execution.

A copyholder who could only grant a lease for a year, made three leases, each for a year, the second and third to commence two days after the expiration of the preceding lease. *Held*, that the three leases were one transaction and void: *Mathews* v. *Whetton* (1631), Cro. Car. 233.

Leases by copyholder.

A deed of appointment and a settlement were treated as contemporaneous, so as to be a fraud on a power: *Pryor* v. *Pryor* (1863), 11 W. R. 873; (1864) 12 W. R. 781.

Appointment and settlement.

Lease and counterpart read together: *Burchell* v. *Clark* (1876), 1 C. P. D. 602; 2 C. P. D. 88.

Bill of sale and mortgage.

Bill of sale and mortgage of a reversionary interest under a will

read together, and bill of sale defeated by conditions contained only in the mortgage: *Edwards* v. *Marcus*, [1894] 1 Q. B. 587.

Repugnant clauses.

> If there be two clauses or parts of the deeds repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary: Shep. Touch. 88.

This rule is laid down in numerous old cases and text-books, but it may be doubted whether there is much authority for the rule, and it probably rests on the proposition that if a grant has been made to A. there is nothing left in the grantor to grant to B., so that the grant to A. is effective, while that to B. is not. At any rate, the rule is one which is only applied in the last resort, if a Judge can find nothing else to assist him in determining the question. It is a mere rule of thumb, as Jessel, M.R., calls the converse rule applied to wills: see *Re Bywater, Bywater* v. *Clarke* (1881), 18 Ch. D. pp. 19, 20.

Only a last resort.

Frank-marriage.

The oldest authority for the rule is the judgment in *Blaunket* v. *Simonson* Y. B. 2 Edw. II. (1308), 29, wrongly numbered 26; 17 Selden Society Publications, p. 126, where it is said: "And moreover when two clauses are found in one deed, and they are of divers natures and repugnant, regard should be had rather to the first that stands in the deed than to those that are subsequent," and it was consequently held that a grant in frank-marriage habendum in fee operated as a grant in frank-marriage only.

"When there are two clauses in a deed, of which the later is contradictory to the former, there the former shall stand; as in Fitz., *Feoffments and Faits*, 94; Y. B. 2 Edw. II. (this reference is to the case above mentioned); Y. B. 4 H. VI. (1425), 22, of a gift in frank-marriage, rendering rent, the reservation is void:" per Nicholas, B. *Cother* v. *Merrick* (1657), Hard. 89 at p. 94; and to the same effect, per Lord Mansfield, C.J., *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109 at p. 113; 2 Black. Com. 381, citing the case in Hard.; and also per Kindersley, V.-C., *Re Webber* (1850), 17 Sim. 221 at p. 222. In *Sury's Case* (1626), Latch. 264, it is said: "When there is repugnance between the words, the law prefers the first: 2 Edw. II., Feoffments, 94. So that if a lease is made reserving annually during the term 10*l*. to the lessor for twenty years, this is a good reservation for the whole term. So in *Slingsby's Case* (1588), 5 Rep. 19, a lease to two, habendum jointly and severally, they are joint tenants."

Lease.

Lease to three, habendum to them for their lives and the life of the survivor; proviso that one should take no interest during the lives of the others held void, as being repugnant: *Scovell and Cavel's Case* (1588), 1 Leon. 317.

A lessee for a hundred years made a lease to Thomas Seaman for forty years if he should so long live; and afterwards he leased the same land to John his son, habendum after the term of Thomas for twenty-three years, *to be counted from the date of these presents. Held*, that the lease to John began, not from the date, but from the end of the term of Thomas, because when by the first words of the limitation it is a good lease to begin after the term of Thomas, it shall not be made void by any subsequent words: *Seaman's Case* (1611), Godb. 166.

Surrender. Surrender of copyholds by J. R. to the use of A. and B. "this surrender not to stand and be in full force until after the death of J. R." The latter words were rejected for the repugnancy: *Seagood* v. *Hone* (1634), Cro. Car. 366; Sir W. Jones, 342.

Life Estate. Conveyance to A., her heirs and assigns, habendum to A. and her assigns during the life of G.; G. was A.'s heir-at-law. *Held*, that on A.'s death G. took as special occupant, and that the land did not pass to A.'s executors by the words in the habendum: *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663.

"Sterling lawful money of Ireland." "It being then impossible to affix a meaning to the words, 'sterling lawful money of Ireland,' taken altogether, I must deal with them according to the rule of law as to construing a deed; which is, if you find that the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter. And it appears to me that there is no possible method of dealing with this set of words other than by saying that the words 'one yearly rent-charge or sum of 1,000*l.* sterling lawful money,' must be taken to stand by themselves, and the words 'of Ireland' must be rejected:" per Shadwell, V.-C., *Cope* v. *Cope* (1846), 15 Sim. 118 at p. 126.

Question is really what is scope of deed. It appears that in most of the cases the true reason for rejecting the latter words was that they were inconsistent with the general scope of the deed. In *Cother* v. *Merrick* (1657), Hard. 89, the question was whether a lease by a tenant in tail, where the reservation was to his heirs and assigns, was good within the statute of 32 Hen. VIII. to bind the issue in tail, who was not the heir of the lessor; and the case was really decided upon the fact that the word "heirs" might be held to mean "heirs in tail." In the second case of frank-marriage the reason for the decision appears to be

that a gift in frank-marriage cannot carry rent for four generations; and in *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109, it was merely a dictum. In *Cope* v. *Cope* (1846), 15 Sim. 118, the construction really turned upon the whole tenor of the deed.

Real intention to be effectuated.

This view of the nature of the rule is supported by the following remarks of Wilde, C.J., in delivering judgment in *Walker* v. *Giles* (1848), 6 C. B. 662 at p. 702: "As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected; and so construing the deed, the Court is of opinion that the latter part, importing a demise, cannot have that effect, without defeating the intention of the parties."

Latter clause preferred.

In *Doran* v. *Ross* (1789), 1 Ves. Jr. 57; 3 Bro. C. C. 27, the latter of two inconsistent clauses was, on the construction of the whole settlement, allowed to prevail, though the Lord Chancellor thought that to do so was contrary to what the parties had meant to do.

Repugnant words may be rejected: omitted words may be supplied: words may be transposed: parentheses may be inserted: and false grammar or incorrect spelling may be disregarded: if the intention of the parties sufficiently appear from the context.

Repugnant words rejected.

"The result of all the authorities is that when a Court of law can clearly collect from the language within the four corners of the deed or instrument in writing the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned:" per Kelly, C.B., *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209 at p. 215.

Leases.

"Et pur ceo jeo ne veux agréer a ceo que ad ēe dit, si un lesse pur 10 ans a volōt', que ceo sera determin' a volunt'; ceo n'est issint: car or ceux parols a volunt' sont contrariant', & pur ceo sont void: car chescun parol' qui est contrariant' al'estat est void:" per Brooke, J., Y. B. 14 Hen. VIII. (1522), Mich. No. 6, p. 13 a.

"Si home lesse pour x. ans a volunte le lessour cest paroll volunte est voyde car est repugnaunt:" Bro. Abr. tit. Lease,

par. 13, fo. 60.; Bac. Abd. tit. "Leases and Terms of Years" (L) 3, vol. 4, p. 836 (7th ed.).

"From the day of the making" rejected as repugnant in a reversionary lease: *Anon.* (1506), Dyer, 261 b, pl. 28.

Lease reserving rent payable at Michaelmas and Lady Day or fourteen days thereafter, proviso for re-entry if rent unpaid *post aliquod terminorum vel festorum praedictorum in quo solvi debet*, for the space of fourteen days *post aliquod festum praedict.*, the words "*post aliquod festum praedict.*" were rejected: *Clark and Kempton's Case* (1583), 4 Leon. 91.

Lease to three persons for their lives, proviso that if one should enter or take any profits during the lives of the others, then the estate limited to him should cease and be void, the proviso was rejected as repugnant: *Moore and Savil's Case* (1585), 2 Leon. 132.

Jointly and severally.

A grant or lease to two jointly and severally, the word "severally" is rejected: *Slingsby's Case* (1588), 5 Rep. 18 b; Jenk. Cent. 262, case lxiii.; S. C. *sub nom. Beckwith's Case*, 2 Leon. 47; 3 Leon. 160.

Demise for forty years containing covenant for quiet enjoyment "for the term of eighty years aforesaid," "eighty" was rejected: (Temp. Eliz.) Savile, 71, cxlvii.

Bonds.

In a bond dated 1593 conditioned for payment "of lawful English money which shall be in the year 1599 in and upon the 13th October next ensuing the date hereof," "the date hereof" were rejected: *Sharplus* v. *Hankinson* (1597), Cro. Eliz. 420.

Condition of a bond "To deliver 35,000 tiles to the value of 144*l.* at 15*s.* 6*d.* per 1,000." It is obvious that 185,800 tiles would have cost 144*l.* The mistake was corrected on the ground that the sum of money and not the number of tiles was the thing material: *Holmes* v. *Ivy* (1678), 2 Show. 15.

Repugnant condition in a bond rejected: *Wells* v. *Tregusan* (1708), 2 Salk. 463.

Bond conditioned if the obligor should *not* pay. "Not" was rejected: *Anon.*, cited by Buller, J., in *Bache* v. *Proctor* (1780), Doug. 382 at p. 384.

After the death of A.

"After the death of A." were rejected in a settlement limiting land to A. for ninety-nine years, if he should so long live, and *after his death* or other sooner determination of the term to trustees during the life of A., upon trust to preserve contingent remainders and after the determination of the term to the sons of A. in succession in tail: *Parkhurst* v. *Smith* (1742), Willes, 327; S. C. *sub nom. Smith* v. *Packhurst*, 3 Atk. 135.

So in *Barker* v. *Freeman* (1772), Lofft, 31, and *Goodtitle* d. *Weston* v. *Burtenshaw* (1772), 1 Fearne's Cont. Rem. App. p. 570, in marriage settlements where the limitations were to the use of A. for ninety-nine years if he so long live, and after his decease to trustees to preserve contingent remainders during his life, the words "after his decease" were rejected, or such words as "or other sooner determination of the said term" were read into the settlements, in order to carry into effect the intentions of the settlors, which would have failed for want of immediately vested freehold estates on which to found the subsequent limitations.

Life estate.

In a marriage settlement a limitation to the use of the husband for life was rejected as inconsistent with the whole deed: *Doran* v. *Ross* (1789), 1 Ves. Jr. 57; 3 Bro. C. C. 27.

In a release following a lease for a year to B., who was a trustee for C., the hereditaments were granted unto C. in his possession &c., habendum to B. and his heirs, to such uses as C. should appoint. *Held*, that the words "unto C. &c." in the premises ought to be rejected: *Spyve* v. *Topham* (1802), 3 East, 115.

Proviso determining estate tail on death.

A proviso for determining an estate tail as if tenant in tail were dead; this has been held a contrariant proviso and void on that account, because the death of a tenant in tail does not determine the estate tail, but his death without issue; and consequently to say that the estate tail shall determine as if he were dead amounts to saying that it shall determine as it would do upon an event (viz., death of tenant in tail), which event might not determine it, and therefore such a proviso is contradictory and absurd in itself: Fearne's Cont. Rem. 252 (10th ed.), citing *Corbet's Case* (1600), 1 Rep. 83 b.

Proviso limiting covenant.

In a deed of dissolution of partnership B. covenanted that *for and notwithstanding any act done by him* it should be lawful for A. to receive certain moneys without interruption of B., his executors or administrators, it was held that the words "*for &c.*" must be rejected as being inconsistent with the subsequent parts of the covenant, and that a receipt of the money by B.'s executors was a breach: *Belcher* v. *Sikes* (1828), 8 B. & C. 185.

Printed terms.

A lease for one year, made on a printed form with manuscript alterations, was produced with many stipulations, most of which were wholly inapplicable to such a tenancy; on the face of the lease it appeared to have originally contained words creating a tenancy from year to year, but these had been struck out: it was held that all the terms inapplicable to a tenancy for a single year must be considered as expunged or as only applicable in case the

tenancy should continue: *Strickland* v. *Maxwell*, (1834) 2 Cr. & M. 539.

Separation deed.

A separation deed provided that all outgoings in respect of certain estates should be paid by J., the husband, up to a certain day, and that afterwards they should be paid by M. the wife, "and that J. shall be indemnified therefrom *and from all the present debts and liabilities of J.*" *Held*, that as the words in italics made the clause inconsistent with itself they ought to be disregarded: *Wilson* v. *Wilson* (1847) 15 Sim. 487.

Appointment.

In an appointment where a reference was made to a previous appointment as having been made in favour of O. and her children, the words "and her children" were rejected, the previous appointment having, in fact, been in favour of O. alone: *Hanbury* v. *Tyrell* (1856) 21 B. 322.

Grant of rent-charge.

In a deed of covenant, after reciting the grant of the site of a canal in consideration of a perpetual rent-charge to be paid to A. or the person or persons to whom the inheritance of the site should belong in case the grant had not been made, a covenant with A. "and to and with the said person or persons to whom the freehold and inheritance of the hereditaments and premises hereinbefore recited to be released shall for the time being belong" to pay the said rent-charge, the words "shall for the time being belong" were rejected as repugnant, and the payees were ascertained from the recitals and a subsequent deed: *Gwyn* v. *Neath Canal Navigation Co.* (1868), L. R. 3 Ex. 209.

Proviso limiting liability.

Covenant by C., D., E. and F., "churchwardens and overseers of poor of the parish of Z., for themselves and for their successors, churchwardens, &c., with A. that they, the said churchwardens and overseers of the poor, their successors and assigns, would pay certain sums, followed by a proviso that nothing in the deed should extend to any personal covenant of or obligation upon C., D., E. and F. or in anywise personally affect them or any of them. *Held*, that the covenant was a personal covenant, and that the proviso being repugnant thereto was void: *Furnivall* v. *Coombes* (1843), 5 Man. & Gr. 736; 6 Scott, N. R. 522; but such a proviso would not have been void if it had limited, without destroying, the personal liability: *Williams* v. *Hathaway* (1877), 6 Ch. D. 544.

Policy.

"Our opinion is that as it is a policy on the ship we must strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship:" per Lord Esher, M.R., *Stewart* v. *Merchants' Marine Insurance Co.* (1885), 16 Q. B. D. 619 at p. 621.

"We have a right to look at what is written into the printed

Charter-party.

form and at what is struck out. . . . There are stipulations in the charter-party which ought to have been struck out if the parties had been careful. They would be evidence by themselves that Furness had retained possession of the ship; but taken with the rest of the stipulations, they must be treated as inefficient and must be disregarded in a contract which is a giving up by Furness and a giving over to the charterers for four months of the whole and absolute possession and control of the ship: "per Lord Esher, M.R., *Baumvoll Manufactur Von Scheibler* v. *Gilchrest & Co.*, [1892] 1 Q. B. 253 at pp. 256 and 257. And see also per Lord Herschell, L.C., S. C. *sub nom. Baumwoll, &c.* v. *Furness*, [1893] A. C. 8 at p. 15.

Bill of lading.

So in a bill of lading providing for the transport of oranges from Malaga to England, a clause in print giving liberty to call at all Mediterranean ports in any order was confined to ports between Malaga and England: *Glynn* v. *Margetson*, [1893] A. C. 351.

Words repugnant at law.

Of course the rule here stated, which is a rule of construction, is quite different from the rule of law that words which are repugnant to an estate limited by the deed are void; some examples of the latter rule are collected *infra* in the Chapter on Limitations to Heirs.

Omitted words supplied:—

Names of "grantor,"

The name of the grantor, which was omitted in the operative part of the deed, was supplied from the context in *Lord Say and Seal's Case* (1711), 10 Mod. 41 at p. 45; 4 Br. P. C. 73; *Trethewy* v. *Ellesdon* (1689), 2 Vent. 141; and *Dart* v. *Clayton* (1864), 4 N. R. 221; see *Mill* v. *Hill* (1852), 3 H. L. C. 828 at pp. 846 *et seq.*

"grantee;"

"If A. give lands to have and to hold to B. and his heirs, this is good albeit the feoffee is not named in the premisses:" Co. Litt. 7 a.

The name of the grantee omitted from the premises was supplied from the habendum in *Butler* v. *Dodton* (1579), Cary's Rep. in Ch. 86, and *Bustard* v. *Coulter* (1602), Cro. Eliz. 902, 917, in which case, however, the point seems to have been admitted on the pleadings rather than decided, and in fact from the earlier report it seems that the decision might have been the other way.

"obligor;"

In a bond the christian name of the obligor, for which there was a blank or blot, was supplied from the signature: *Dobson* v. *Keys* (1610), Cro. Jac. 261; and the name of one obligor was also supplied; *Crosby* v. *Middleton* (1707), 3 Chan. R. 99.

"heirs;"

The words "heirs" omitted in the limitation of a rent-charge was supplied from the power of distress: *Vernon* v. *Gatacre* (1566), Dy. 253 a.

"heirs of the body;"

In a marriage settlement lands were limited to the use of the

husband for life with remainder to the use of the first son of the body of the husband by the wife (without any words of limitation), and for default of such issue to the use of the second, third, and other sons of the body of the husband by the wife severally and successively according to seniority, and of the several heirs male of their several bodies; with divers remainders over. *Held*, the first son of the husband by the wife born during his life took an estate tail: *Galley* v. *Barrington* (1824), 2 Bing. 387.

"of the body;"

In a marriage settlement lands were limited after life interests to the husband and wife, to the first and other sons of the marriage and their heirs successively in order of seniority, with remainder to all the daughters of the marriage and their heirs as tenants in common; there were no sons of the marriage, and the question was whether the daughters of the marriage took estates tail or in fee simple. *Held*, that though the Court would construe the limitations to the sons as giving them estates tail, there was no necessity so to construe the limitations to the daughters, and they took estates in fee simple: *Doe* d. *Littledale* v. *Smeddle* (1818), 2 B. & Ald. 128.

The words "of the body" were inserted in a settlement whereby lands were limited to A. for life, remainder to trustees to preserve, &c., remainder to B. (A.'s eldest son) and the heirs of the said B., and for default thereof to A.'s other sons and the heirs male of their bodies successively with divers other remainders, so as to give B. an estate tail only: *Wall* v. *Wright* (1837), 1 Dr. & Wal. 1.

"assigns;"

The word "assigns" was inserted in a proviso for enabling either of the parties to a lease, "his executors or administrators" to determine it by notice to the other, his "heirs, executors, or administrators," so as to enable the devisee of the lessor to determine it: *Roe* d. *Bamford* v. *Hayley* (1810), 12 East, 464.

"without issue;"

The words "without issue" were supplied in a gift over contained in marriage articles providing for the husband and wife and their children and containing a gift over on the death of the wife in the life of her husband: *Kentish* v. *Newman* (1713), 1 P. Wms. 234; *Targus* v. *Puget* (1751), 2 Ves. Sen. 194.

"or;"

The word "or" was supplied in a proviso avoiding a grant "if the said Hester died unmarried having no issue of her body lawfully begotten," she having married but died without issue: *Goshawke* v. *Chiggell* (1629), Cro. Car. 154; S. C. *sub nom. Goshawke* v. *Chickell*, Sir Wm. Jones, 205, where the words of a proviso are stated to have been "if she die before she is married and has issue."

The condition of the bond being "to render a fair, just, and

"to pay;" perfect account in writing of all sums received." *Held*, that non-payment of the sums due on the account was a breach: *Bache* v. *Proctor* (1780), 1 Doug. 382.

"coal;" In a lease which contained a covenant by the lessor to supply panwood (*i.e.*, the refuse or smallest coal) and great chows (*i.e.*, small pieces of coal) and panwood mixed, at certain rates, and a covenant by the lessees not to purchase elsewhere panwood or coals of any kind so long as they were supplied at such rates, the word "coal" was inserted after "great," Lord Eldon saying, "It had been said that it was too strong to insert a word, but the answer was that other words in the lease could not have their proper effect without it:" *Wright* v. *Dicksons* (1813), 1 Dow, 141.

The word "hundred" was inserted between the words "one" and "pounds" in a bond: *Waugh* v. *Bussell* (1814), 5 Taunt. 707.

"pounds." The word "pounds," which had been omitted in the obligation of a bond, was supplied: Lord Tenterden, C.J., saying, "The obligatory part of the bond purports that the obligor is to become bound for 7,700. No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, Whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay:" *Coles* v. *Hulme* (1828), 8 B. & C. 568. So in a bill of sale the word "pounds" was inserted in a covenant for payment by instalments of "seven:" *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216.

"Stated to have been" A father, P., by deed of 22nd February, 1836, appointed 5,000*l.* to his daughter O. for her separate use, with power to appoint, &c. On the day following the daughter appointed 1,000*l.* to her husband and 4,000*l.* to trustees upon trusts for the benefit of herself, her husband and children. P. also made appointments of 5,000*l.* to each of his daughters E. and H. On 22nd November, 1842, P. by deed poll reciting that he had appointed 5,000*l.* to each of E. and H., "and also the sum of 5,000*l.* in favour of O., appointed 5,000*l.* to M. for life, remainder as to one-third to E., as to another third to H., and the remaining third to "O. the wife of R. and her children upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the said sum of 5,000*l.* hereinbefore appointed unto or for the benefit of the said O., wife of R., or as near thereto as the nature of circumstances will admit." *Held*, that the deed must be construed as if the words "stated or mentioned to have been" had been inserted after the words "as are

hereinbefore," and as if the words "and her children" had been omitted: *Hanbury* v. *Tyrell* (1856), 21 Beav. 322.

"first son,"

Settlement on marriage of real estates for husband and wife for life, remainder in tail for the first son of the husband begotten on the wife, remainder in tail for the second, third, and all and every the son and sons of the husband severally and successively in seniority of age and priority of birth (but not by the then contemplated marriage only, but by any marriage). There was no son of the husband by the then contemplated marriage, but he married again and had several sons. *Held*, that the eldest son of the husband by the second marriage took the first estate tail: *Re Blake* (1870), 18 W. R. 916; 19 W. R. 765.

"or being daughters attain 21,"

By a post-nuptial settlement reciting an intention to make further provision for the wife and the children of the marriage, certain sums of stock were settled on trust for the wife for life, and after her death "in trust for all and every the child and children of the marriage who being a son or sons have or hath already attained or shall hereafter live to attain the age of twenty-one years," as tenants in common and their respective executors, "and if there shall be but one such child the whole shall be in trust for such one or only child and *his* or *her* executors and administrators." The maintenance clause spoke of "*his* or *her* maintenance, &c., until *his* or *her* share should be vested, or *he* or *she* previously die." *Held*, that the words "or being a daughter or daughters shall attain twenty-one," must be inserted in the trusts for children: *Re Daniel's Settlement Trusts* (1875), 1 Ch. D. 375.

"or cesser of prior trusts."

Where personalty was settled upon trust for the wife for life with remainder for the husband until he should become bankrupt or until his death, which should first happen, and after the decease of both husband and wife, upon trust for the children, the husband became bankrupt during the wife's life, but was living at her death. *Held*, that on her death the children took and that there was no resulting trust: *Re Akeroyd's Settlement, Roberts* v. *Akeroyd*, [1893] 3 Ch. 363.

"Fee simple" not inserted.

But the Court refused to supply as a matter of construction the word "simple" in a re-conveyance of freehold land, habendum "to the use of the" mortgagor "in fee" freed and discharged from the mortgage debt: *Ethel and Mitchell's and Butler's Contract*, [1901] 1 Ch. 945.

Words transposed.

Leases.

"It is not rare, say they, in our books that words shall be transposed and marshalled so as the feoffment or grant may take effect. As if a man in the month of February make a lease for

years reserving a yearly rental payable at the feasts of St. Michael the Archangel and the Annunciation of our Lady, during the term, the law in this case of reservation shall make transposition of the feasts, viz., at the feasts of the Annunciation and of St. Michael, that the rent may be paid yearly during the term. And so it is in case of a grant of an annuity:" Co. Litt. 217 b. The cases referred to by Coke are *The Abbott of Osenay's Case*, Y. B. 10 Edw. III. (1336), Mich. 43, pl. 4, and *Hill* v. *Grange* (1556), 1 Plow. 164 at p. 171.

"The wisdom of the law useth to transpose words according to the sense; and not so much to respect how the words do take place, but how the acts, which are guided by those words, may take place;" and "The law will rather invert the words than pervert the sense:" Bacon's Law Tracts, Case of Revocation of Uses (edn. 1737), pp. 235, 236.

"Words shall be transposed to support the intent of the parties:" Comyns' Digest, art. "Parols," A. 21.

Lease.

"If a man maketh a lease reserving rent, habendum for many years, so that the reservation is placed before the habendum, yet this is good and the Judges by their construction are so to marshal the words as to make it to be a reservation of the rent for the whole term:" per Coke, C.J., *Attoe* v. *Hemmings* (1614), 2 Bulstr. 281 at p. 282.

Term read before estate tail.

Where in a marriage settlement a term for securing younger children's portions was placed subsequent to the estates tail of the sons, it was helped in equity: *Uvedale* v. *Halfpenny* (1723), 2 P. Wms. 151; 2 Eq. Ca. Ab. 718, pl. 4; but probably this was a case of rectification.

"The law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties:" per Willes, L.C.J., *Parkhurst* v. *Smith* (1742), Willes, 327, at p. 332.

"Such" referred to a clause following as well as a clause preceding.

Conveyance by marriage settlement to A., the intended husband, his heirs and assigns, and in case A. should die leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons and the heirs male of his body being always preferred to take place before the younger . . . with full liberty to the said A. "to make such reasonable provision as he should think fit for *such* younger child or children," and in case the said A. should die leaving no son and that there should be one or more daughters, then to such daughter or daughters if more than one, on their attaining their respective ages of twenty-one years, their

heirs and assigns, share and share alike. *Held*, that as the intention of the settlement was evidently to provide for all the children, as well daughters as sons, the Court would effect that intention by transposing the clause creating the power and that containing the limitation to the daughters, whereby the words "such younger child or children" would include both sons and daughters: *Fenton* v. *Fenton* (1837), 1 Dr. & Wal. 66.

Parenthesis inserted.

By the insertion of a parenthesis, or by punctuation, words of limitation have been annexed not only to the grants immediately preceding, but to all the previous grants: *Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39; *Owen* v. *Smyth* (1796), 2 H. Bl. 594; *Galley* v. *Barrington* (1824), 2 Bing. 387; 10 J. B. Moore, 21; *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1; *Re Denny's Estate* (1874), Ir. R. 8 Eq. 427; and compare *Langston* v. *Langston* (1834), 2 Cl. & F. 194 (a case on a will).

In a marriage settlement the trusts were to pay the income of certain funds to Mrs. Tunstall *for her separate use during her coverture*, and in case she should die in the lifetime of her husband then to him for life, and after the death of the survivor to hold the capital upon trusts for the issue. *Held*, that the words in italics could be read as in a parenthesis, so as to give Mrs. T. a life interest by implication: *Tunstall* v. *Trappes* (1829), 3 Sim. 286 at p. 312.

False Latin.

Nota q̄ fuit dit p. Vavisor in m̄ le ple ut sup. q̄ si faux Latin soit en un br̄, sicōe le br̄ est et habeas ibi hac breve ou il ser̄ hoc breve le br̄ abat̄ & ne ser̄ amend' p̄ c̄ q̄ il poit av̄ meliour br̄. Mes aut̄ ē ou faux Latin est in un obl' ou record ou in un ple; in ceux cases il ser̄ amend' p̄ c̄ q̄ il ne poit av aut obligation ou rec̄ ou aut̄ plē: Y. B. 9 Hen. VII. (1493) 16 b.

False grammar.

"*Falsa grammatica non vitiat concessionem: item, ille numerus et sensus abbreviationum accipiendus est ut concessio non sit inanis.* And therefore if the King grants *tot' ill' maner' de D. et C.* if it is but one manor in truth, then these abbreviations of *tot' ill' maner'* shall be taken in the singular number *totum illud manerium:* and if they are in truth two distinct manors, then these abbreviations shall be taken in the plural number *tota illa maneria*, or otherwise the grant will be void. . . . So in the conusance of a fine, false Latin or incongruity shall not hurt the fine:" *The Earl of Shrewsbury's Case* (1610), 9 Rep. 42 at p. 48 a.

"Si obligation ad incongrue Latyn uncore c'est bon:" Bro. Abr., Obligation, 71; *Jas. Osborn's Case* (1613), 10 Rep. 130 at p. 133 a.

"Neither is it necessary, that the English or Latin, whereby a deed is made, be true and congruous; for false and incongruous

Latin or English seldom or never hurteth a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem:*" Shep. Touch. 55.

"It is a rule of law, *mala grammatica non vitiat chartam*, neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary. And it is another rule of law *falsa orthographia non vitiat concessionem:*" Shep. Touch. 87.

"It is but false Latin, which shall not make void a bond:" *Dobson* v. *Keys* (1610), Cro. Jac. 261.

"For neither false Latin nor false English will make a deed void if the intent of the parties doth plainly appear:" per Willes, L.C.J., *Parkhurst* v. *Smith* (1742), Willes, 327 at p. 332.

Bonds.

Debt on a bond conditioned to pay 7*l.* by 2*s.* a week till the 7*l.* was paid, and if he failed of the payment of the 2*s.* at any of the days wherein it ought to be paid, the obligation to be void or else to remain in full force. The obligor omitted to make the payment of the 2*s.* on one of the days on which it ought to be paid. *Held*, that the condition might be read distributively, by referring particulars to particulars, viz., that if he paid the 7*l.* the obligation should be void: but if he failed of paying the 2*s.* at any of the days, it should remain in force: *Vernon* v. *Alsop* (1662), 1 Lev. 77; 2 Danv. Abr. 25. From the reports of this case in 1 Keb. 356, 415, 451; Sir T. Raym. 68; 1 Sidf. 105, it appears the decision was that the condition was repugnant and void. The decision as stated in the report in Levinz was followed in *Wells* v. *Wright* (1678), 2 Mod. 285.

A bond is made—"Know all men that I Philip Goole do stand bound" (*not said to whom*) "in the sum of 16*l.*, and is to be paid to the said John Garnes the elder's executors; for which payment to be made I do bind me, my heirs and executors" (*but not said to whom*). The condition, after long and senseless recitals, was: "If therefore Philip Goole shall pay to John Garnes the elder's executors within one year after his death, the bond shall be void." *Held*, that either the words "John Garnes the elder's executors," should be disjoined and be read "John Garnes the elder his executors" and to be taken "John Garnes the elder and his executors," or that the words "the elder's executors" should be wholly rejected as void, and the words be read "to be paid to John Garnes" only: *Langdon* v. *Goole* (1681), 3 Lev. 21.

"Thereon"

In a deed of partnership it was provided that the capital of a

deceased partner as at the last balance should be paid out to his representatives by instalments of equal amount at six, &c. months' date from the date of the surviving partners declaring their election to continue the business, "with interest thereon from the date of the last balance." *Held*, that "thereon" was referable not to the last antecedent "instalment," but meant on the balance of capital for the time being remaining unpaid: *Ewing* v. *Ewing* (1882), 8 Ap. Ca. 822.

not referred to last antecedent

On the other hand, where in a lease after divers lessee's covenants there was contained a proviso for re-entry on non-payment of rent or on breach of "any of the covenants *hereinafter* contained on the part of the lessee," and there were no covenants by the lessee after such proviso, but only a covenant by the lessor for quiet enjoyment on payment of rent and the performance of "the covenants *hereinbefore* contained," it was held that "hereinafter" could not be read "hereinbefore" in the proviso: *Doe* d. *Spencer* v. *Godwin* (1815), 4 M. & S. 265; but *quaere* whether this case would now be followed. Lord Ellenborough, C.J., seems to have put his decision on the ground that "if the plaintiff had declared upon the lease and set it out without the word 'hereinafter' and substituting therefor 'hereinbefore,' he would have been nonsuited on a plea of *non est factum*, which hardly seems to be a satisfactory reason for the decision.

"hereinafter."

Incorrect spelling is often disregarded. Thus—

Incorrect spelling.

"Wiginti" was read as "viginti:" Y. B. 9 Hen. VI. (1431) 7 a.

In a patent of Henry VII. the initial letters of the first four words of the King's style and title were omitted and spaces left for them (it having been intended that these letters should be elaborately engrossed after the rest of the document had been written), nevertheless it was held that the patent was good without amendment or rectification in Chancery: *Digby* v. *Mountford* (1574), Dy. 342 a pl. 53.

"Septuagentis" was read as "septingentis:" *Walter* v. *Pigot* (1602), Cro. Eliz. 896; Moore, 645; S. C. *sub nom. Walter* v. *Piggot*, Hob. 116, where the word is given as "septuagint'."

"Nobulis" was read as "nobilibus:" *Mathew* v. *Purchins* or *Burching* v. *Vaughan* (1607), Cro. Jac. 203.

"Sexingentis" was read as "sexcentis:" *Anon.* (1607), 2 Roll. Abr. 147, pl. 11.

"Sessanta" was read as "sexaginta:" *Parker* v. *Keneday* (1608), Hob. 19; 1 Brownl. & G. 62; and S. C. *sub nom. Parker* v. *Rennaday*, Cro. Jac. 308, where the word is given as

"cessanta;" in some of the reports it is stated that the bond was in Italian.

"Tenerie et obligarie" was read as "teneri et obligari:" *Dodson* v. *Kayes* (1610), Yelv. 193; S. C. *sub nom. Dodson* v. *Keyes*, 1 Brownl. & G. 110.

"Quinquagesimis" was read as "quinquaginta:" *Ells* v. *Clark* (1611), Cro. Jac. 290.

"Trigintata" was read as "triginta" in *Loggin* v. *Tetherton* (1611), Hob. 18; "trigintate" as "triginta," in *Biggins* v. *Tytherton* (1612), Cro. Jac. 309; but "trigintatae" was not read as "triginta" in *Loggins* v. *Titherton* (1612), Yelv. 225; but "trigintate" was read as "triginta" in *Higgens* v. *Totherden* (1614), Cro. Jac. 355. (These four cases appear to be the same case in different stages, and if so the last decision that the word could be read as "triginta" must be accepted as correct.)

"Octaginta," "septungenta," and "sewtene" were respectively read as "octoginta," "septingentis," and "seventeen" in cases cited in *Jas. Osborn's Case* (1613), 10 Rep. 130 at p. 133 a.

"Sexigintis" was read as "sexaginta:" *Marsham* v. *Jolley* (1614) 2 Bulstr. 241; S. C. *sub nom. Jolley* v. *Masham*, 1 Roll. Rep. 47; 2 Roll. Abr. 147, pl. 10; *sub nom. Masdame* v. *Jolly*, Hob. 20.

"Octagesimo" read as "octoginta:" *Vernon* v. *Onslow* (1614), 1 Brownl. & G. 60; Moore, 864; Hob. 75.

"Triginti" read as "triginta:" *Taylor* v. *Thorpe* (1619), 2 Roll. Ab. 146, pl. 5.

"Threty-two ponds" read as "thirty-two pounds:" *Hulbert* v. *Long* (1620), Cro. Jac. 607.

"Octoginta et terdecem annos" was read as "octoginta et tresdecem annos:" *Hopehill* v. *Searle* (1634), Cro. Car. 386.

"Joaem," without any dash or prick over it, was read as an abbreviation for "Johannem," and "quinginta" as "quinquaginta:" *Downs* v. *Hathwait* (1635), Cro. Car. 418.

A testator made his will, writing "I make 'A. B.' my solle ayeare and my yexecutor." *Held*, that this operated as if he had written "heir" and "executor:" *Tayler* v. *Webb* (1651), Styl. 301, 307, 319.

In Chancery, Lord Nottingham, L.C., aided a mistake of "quadraginta" for "quadringentis," where the bond was to secure payment of 200*l.*: *Sims* v. *Urry* (1676), 2 Cha. Ca. 225.

"Nongint' et octogessimis" read as "nongentis et octoginta:" *Rossell* v. *Rossell* (1687), Lut. 422; Nel. Lut. 127.

"Tricesimo secundo" read as "triginta duobus:" *Dennis* v. *Snape* (1687), Comb. 60.

"Quadrans" read as "quadraginta:" *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; 1 Ld. Raym. 335; Holt. 502; S. C. *sub nom. Cromwell* v. *Grimsdale*, Comb. 477; *sub nom. Cromwell* v. *Grumsdale*, 12 Mod. 193.

Most of these cases were cases of bonds conditioned for the payment of money, and the intention of the parties was made apparent by the condition.

Bonds held void.

In the following cases, where bad spelling was apparently held to avoid the deed, the real decision probably was, that the declaration having altered the word, differed from the deed, and hence enabled a plea of *non est factum* to prevail.

"Octigent" was not read as "octoginta:" *Fitzhughes' Case* (1561), Hob. 19.

"Liveris" was not read as "libris:" *Anon.*, cited *Durchin* v. *Vaghan* (1607), 2 Roll. Abr. 146, pl. 6.

"Sexaginta" not read as "sexcenta:" *Gregg* v. *J. S.* (1607), Cro. Jac. 190.

"Sexgintis" not read as "sexcentis:" *Gerry* v. *Davis* (1607), Yelv. 105.

"Quemquegentis" not read as "quingentis:" *Parry* v. *Dale* (1606), Cro. Jac. 146; Yelv. 95, where the word is given as "quimquegent';" on appeal (1616), Hob. 119, where the word is given as "quinquegintis." Hobart states that the case was compromised in the Exchequer Chamber by the mediation of the Judges; that he and most of the Judges thought it good, but the Chief Baron, who had been party to the decision in the King's Bench, "stuck." A bond for "terengentate liberis" was held void: *Hills* v. *Cooper* (1620), Cro. Jac. 603, in which case was cited *Partrose's Case*, where a bond for twenty "literis" was held void, and not read as one for twenty "libris." In the two latter cases it seems that the judgment was that the bonds were void and not merely that the plea of *non est factum* succeeded.

Where the plaintiff declared for "quadraginta" pounds, and the bond was for "quadragenta," it was held to be a material variance: *Fielder* v. *Tovy* (1651), Styl. 241, 257.

Where the plaintiff declared for 50*l.* and the bond was for "quantogint'" pounds, the defendant had judgment on demurrer: *Strange* v. *Greenhill* (1677), Sir T. Jones, 48.

CHAPTER VI.

AMBIGUITIES—EQUIVOCATIONS—INACCURACIES.

Ambiguities (Patent and Latent) and Inaccuracies Defined and Distinguished : Deed void for Uncertainty : No Evidence of Intention to Explain Patent Ambiguity : Ambiguity determined by Election: Equivocations : Direct Evidence of Intention to determine Equivocation : General joined with Particular Statement : No part of Description applicable : Part only of Description applicable : Part of Description applicable to One, Part to Another, object.

Much confusion exists, even in judicial decisions, between the different kinds of ambiguity, and between ambiguities and inaccurate descriptions.

Ambiguities.

There are two kinds of ambiguity :—

Patent ambiguity.

First, where the ambiguity arises from the fact that the parties have expressed inconsistent intentions on the face of the deed.

An ambiguity of this class is apparent to any person perusing the deed, even if he be unacquainted with the circumstances of the parties, and is called a "patent ambiguity."

Latent ambiguity or equivocation.

Second, where no ambiguity is apparent on perusal of the deed, to a person unacquainted with the circumstances of the parties, but after evidence of the circumstances of the parties is obtained, it is discovered that there are several persons or things or classes of persons or things, to each of which a name or description contained in the deed seems to be equally applicable.

An ambiguity of this class is called a "latent ambiguity" or an "equivocation."

Inaccurate description.

An inaccurate description is one that does not exactly fit any person or thing, or class of persons or things.

A grant of "my house" to "the son of A." appears unambiguous, and it is not till it appears from extrinsic evidence that the grantor has two houses or that A. has two sons, that the equivocation becomes manifest.

It may be remarked that many words bear more than one meaning, and as no man can know all the possible meanings of every word in the language, it may happen that while the parties to a deed think that they have expressed their intentions in an unambiguous manner, the language appears to be ambiguous to a person who is aware that some of the words are capable of more than one meaning.

Ambiguities arising from words bearing more than one meaning.

Ambiguities arising solely from the fact that the words are capable of more than one meaning (a class which, it will be observed, includes equivocations) are sometimes called "latent ambiguities," while at other times that phrase is restricted to equivocations, as above defined. To avoid confusion the term "equivocation" is herein always applied to a description which seems to be equally applicable to more than one person or thing, or class of persons or things, where only one is intended.

Equivocations.

It should perhaps be remarked that a description may be equivocal without being inaccurate, and may be inaccurate without being equivocal. If A. has two freehold houses in London the phrase "A.'s freehold house in London" is equivocal, but it is not inaccurate. The description fits each house, though it does not distinguish between them. On the other hand, if A.'s only house in London is leasehold, the description, "A.'s freehold house in London," is inaccurate, but not equivocal.

Inaccurate distinguished from equivocal description.

Where a *patent* ambiguity exists, the grantor appears to be halting between two intentions; *e.g.*, "I grant my house to my nephew John or Thomas;" a limitation "to one of the sons of A." In each of these cases the grantor has given a correct description of the object of his bounty, but he has not stated clearly whether John or Thomas, or which of the sons of A. is to be that object. Such evidence as is admissible under the preceding rules might show that John and Thomas denoted the same person, or that A. had only one son, and that that fact was known to the grantor (see Wigram, Extr. Ev. p. 80, pl. 79); in which case the ambiguity would disappear; but if this is not the case, if the ambiguity remains after the application of such evidence, the grantor has expressed no intention that can be ascertained. Similar remarks apply to the case where the ambiguity occurs in the subject-matter of the gift. These considerations give rise to the following rule:—

Patent ambiguities.

> Where after the application of extrinsic evidence to determine the literal meaning of the words used, and of intrinsic evidence to determine in what secondary

Deed containing patent ambiguity void for uncertainty.

meaning, if any, they are employed, a patent ambiguity remains as to the person or thing intended, or as to what is to be done, the intention of the parties cannot be ascertained, or, as the rule is commonly expressed, the deed or clause is void for uncertainty.

"If one grant to one of the children of J. S., and J. S. hath more than one, and he do not describe which he doth intend, this grant is void for incertainty:" Shep. Touch. 251; *Paston* v. *Genney*, Y. B. 11 Edw. IV. (1471), 2 a.

Leases.

Lease dated 10th October, habendum "from the 20th day of November, for five years." *Held*, void for the uncertainty what November is meant: *Anon.* (1673), 1 Mod. 180. But a lease from the feast of Our Lady, *Held* good by election: *Anon.* (1590), 1 Leon. 227, ca. cccviii. Agreement for sale of land, "the vendor reserves the necessary land for making a railway through the estate to P." *Held*, void for the uncertainty: *Pearce* v. *Watts* (1875), L. R. 20 Eq. 492. But where A. purchased an estate, having agreed with B. that if it were purchased B. should have a part of it, as to which there was some uncertainty, a reference to Chambers was directed to ascertain what such part was: *Chattock* v. *Muller* (1878), 8 Ch. D. 177.

Where a lessor of mines reserved power to work mines not included in the lease, with a proviso that in exercising such powers the working of the mines demised should not be unnecessarily interfered with, such proviso was held void for uncertainty: *Mundy* v. *Duke of Rutland* (1883), 23 Ch. D. 81.

Evidence of intention not admissible to explain patent ambiguity.

No direct evidence of intention is admissible to explain a patent ambiguity.

This rule follows from the principles above laid down, but it appears convenient to state it expressly, so as to contrast patent ambiguities with equivocations.

"*Ambiguitas patens*" (*i.e.*, an ambiguity apparent on the deed or instrument) "is never holpen by averment" (*i.e.*, by offering direct evidence of intention); "and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed. . . . It holdeth generally

that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty:" Bac. Elem. Rule 23; Bac. Law Tracts, (ed. 1737), p. 99.

One of J. S.'s sons.

"If a man by deed gives goods to one of the sons of J. S., who has divers sons, here he shall not aver" (*i.e.*, offer direct evidence of intention) "which son he intended, for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment—*vide Paston* v. *Genny*, Y. B. 11 Edw. IV. (1471), 2 a. . . . Where the words are in the limitation of the estate to two *et haeredibus*, that is apparent in the fine, and by judgment of law these words *et haeredibus* are uncertain and void" (because it does not appear whose heirs are meant), "and no averment *dehors* can make that good, which upon consideration of the deed is apparent to be void:" *Altham's Case* (1610), 8 Rep. 150 b at p. 155 a. (To understand this it should be remembered that a gift to one man *et haeredibus* omitting *suis*, followed by livery, gave him a fee simple: Co. Litt. 8 b.)

Figures and words discrepant.

An action was brought on a bill of exchange expressed in figures to be drawn for a different sum from that expressed in words. Evidence of the intention of the parties as to the sum for which it was drawn was rejected, Tindal, C.J., saying: "This is a case of *ambiguitas patens*, and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument the law admits no extrinsic evidence to explain it:" *Saunderson* v. *Piper* (1839), 5 Bing. N. C. 425 at p. 431. By "extrinsic evidence," the Judge meant "direct evidence of intention."

Ambiguity in subject-matter determined by election.

In some cases an ambiguity, as to the subject-matter, or the estate granted, may be determined by the election of one of the parties.

When to be made during life.

The rules as to election are given in Co. Litt. 145 a as follows: "Note as to election these diversities following. First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors. Secondly, when one and the same thing

passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie his heires or executors may make election when they will. Thirdly, when election is given to severall persons, there the first election made by any of the persons shall stand. Fourthly, in case an election be given of two severall things alwaies he, which is the first agent, and which ought to do the first act, shall have the election. As if a man granteth a rent of twenty shillings or a robe to one and to his heires, the grantor shall have the election, for he is the first agent by payment of the one, or deliverie of the other. So if a man maketh a lease rendering a rent or a robe, the lessee shall have the election *causâ qua supra.* But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of D. there the grantee shall have election; for he ought to do the first act, *scil.* to fell and take the same. Fifthly, when the thing granted is of things annual, and are to have continuance there the election remaineth to the grantor (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed, *unicâ vice.* And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he brings his writ of annuitie for the one onely, and recover, this judgment shall determine his" (but *quaere* this is a mistake for 'the' or 'my') "election for ever; for he shall never have a writ of annuitie afterwards, but a *scire facias* upon the said judgement. Which reason, Fitzherbert, in his Natura Brevium, not observing, held an opinion to the contrarie (see F. N. B. 152, G). But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other. Sixthly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both: in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee." To which Butler adds as a note: "But if the grant be to hold one acre for life and the other in fee and donee makes feoffment of one acre only, it is an election to have the fee of that; and this being lawful nothing is forfeited:" Co.

Who has election.

Recurrent election.

Election lost.

Litt. 145 a. The rules are also stated in *Sir Roland Heyward's Case* (1595), 2 Rep. 36 b.

Grant in disjunctive.

"If one grant to me a rent or a robe; twenty shillings or forty shillings; or common of pasture or rent; in the disjunctive, which is at first very incertain; yet this grant may become good; for if I make my election, or he pay the rent, or perform the grant in either part, the grant is now become good. . . . So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case I may choose which I will have; and in these cases, when I have made my election, and not before, the grant is good. And if in these cases, the grantee doth not make his election during his life [and also the life of the grantor: Co. Litt. 145 a], it seems the grant will never be good:" Shep. Touch. 251.

Land of so much value.

Fine, feoffment, and recovery of land, part of a manor, to a certain annual value. *Held*, good by election of *cestui que use: Calthrop's Case* (1574), Moore, 101; Dyer, 334 b, pl. 33.

120 acres in a waste.

Where a grant is general, as the moiety of a yardland or 120 acres in a certain waste, without certainty in what part of the waste the grantee shall have the land, or the special name of the land, or how it is bounded, and without any certain description of it, the grant may be made good by the election of the grantee, if the grantor be a common person, but not if he be the Crown, in which case the grant is altogether void: *Hungerford's Case* (1585), 1 Leon. 30; *Brand* v. *Todd* (1618), Noy, 29; and see Bacon, Elem. Rule 23; Bacon's Law Tracts (ed. 1737), p. 99.

One yardland.

Where a father settled five yardlands to himself for life, with remainder to the use of his eldest son and his wife Grace and the heirs of the body of his son, with a proviso that if his son predeceased him the wife should have one yardland and a half for life in possession, without saying which particular yardland and one half, it was held that the life estate of the father ceased on the son's death, and that the latter's wife could elect which land she would take: *Marshal* v. *Marshal* (1598), Moore, 602.

No feoffment made good by election.

But it must be pointed out that *livery of seisin* cannot be made of an uncertain area of land, and, therefore, a *feoffment* of land of a certain value is void and cannot be made effectual by election, and thus if a man covenant by indenture to make a feoffment of land of the value of fifty marks and then makes feoffment of all his lands to the use of the indenture generally, and does not set out the land, only the actual place where the livery is made, and not land of the value of fifty marks will pass; for the setting out must be made

before, or at the actual time of, the livery: *Woodhouse* v. *Futter* (1615), 1 Roll. Rep. 187; S. C. *sub nom. Fuller* v. *Woodhouse* (1595); Dyer, 281a, n.

And a feoffment of seventeen acres, part of a larger wood, was held void in *Bullock* v. *Burdot* (1565), 1 And. 111; S. C. *sub nom. Bullock* v. *Burdet* (1565), Moore, 81; *sub nom. Bullock* v. *Burdett* (1568), Dyer, 280 a, pl. 17.

Freehold *in futuro.*

"If then by a deed there had been a grant" (*i.e.*, to take effect immediately) "of a plot of land to be ascertained by election, it follows that until the election nothing passed, and if the deed granted certain specified lands with the exception of a plot to be ascertained by election, it seems to us that the deed would at once pass the whole, but subject to an exception which could only be ascertained and take effect when the election was made:" per Stirling, L.J., *Savill Bros., Ltd.* v. *Bethell,* [1902] 2 Ch. 523 at p. 539.

It follows that if the deed operates at Common Law any such grant or exception will be void as purporting to create a freehold *in futuro,* and that if it operates under the Statute of Uses it will be void as infringing the rule against perpetuities, unless the election must be made within the time limited by that rule: *Bullock* v. *Burdett* (1567), Dyer, 281 a; Moore, 81; 1 And. 111; *Savill Bros., Ltd.* v. *Bethell, ubi sup.*

The following are examples of Coke's fourth rule—

Examples of fourth rule.

If I give to a man my cow or my horse he can take either at his election, but if I promise to give him a cow or a horse at a future time, it is in my election to give him which I choose: Y. B. 21 Hen. VII. (1506), 18 B.

"If I give you one of my horses, although that be uncertain, yet by your election that may be made a good gift:" *Mervyn* v. *Lyds* (1554), Dy. 90 a at p. 91 a.

A covenant by A. with B. that B. should have the marriage of one of A.'s daughters. A. has the election which daughter B. can dispose of in marriage: *Anon.* (1564), Moore, 72, pl. 197.

All except some.

The grantor has an election when the grant is of all except some: *Sir Thomas Lee's Case* (1578), 1 Leon. 268, where the grantor aliened his manor except one close called Newdick, and there were two closes so called; *Billingsly* v. *Hersey* (1611), 2 Bul. 5 at pp. 6 *et seq.*, where a lease was granted of all trees except six great trees.

Agreement by an incumbent to grant a lease at a future time of his glebe, "except thirty-seven acres thereof," which were not specified. *Held,* that the contract was not void, as the right of

selecting belonged to the lessor, he having the first act to do: *Jenkins* v. *Green* (1858), 27 Beav. 437.

If a mortgage debt is made payable to the mortgagee, his heirs, or executors, and he die before the day appointed for payment, the mortgagor may, if he pay on that day, pay either to the heir or the executor: Co. Litt. 210 a. Heirs or executors.

Lease for years to begin at the feast of Our Lady, without saying at which feast, the lessee may determine the beginning of the term at his election: *Anon.* (1590), 1 Leon. 227, ca. cccviii.; but a lease from the 20th day of November was held void for uncertainty: *Anon.* (1673), 1 Mod. 180. Lease.

Agreement for lease for seven, fourteen, or twenty-one years, or lease habendum for seven, fourteen, or twenty-one years, is not void, but gives an option to the lessee to determine the lease at the end of the first seven or fourteen years: *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, 442; *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 15; *Price* v. *Dyer* (1810), 17 Ves. 356; *Powell* v. *Smith* (1872), L. R. 14 Eq. 85. Term uncertain.

Other examples will be found in 1 Roll. Ab. 725, "Election;" Vin. Abr. "Election," B. C.

An election made by tossing or lot is good: *Duckmanton* v. *Duckmanton* (1860), 5 H. & N. 219.

But a grantee from the King has no right of election: *Sir Walter Hungerford's Case* (1585), 1 Leon. 30. If the King grant 120 acres of his waste in D., and the waste contains 300 acres, there nothing passes, for it is uncertain which 120 acres were intended, and the party shall not have any election against the King: *Brand* v. *Todd* (1618), Noy, 29. But in a recent case where lands were imperfectly described in Crown grants by the Governor of New South Wales, and such grants were impeached as void for uncertainty, the grants were upheld, the grantee having been in possession for more than thirty years and paid quit rents to the Crown: *Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. 502. No election against King.

An equivocation is not discovered till the person perusing the deed finds by extrinsic evidence as to the literal meaning of the words employed that the description is equally applicable to more than one person or thing, or class of persons or things. Equivocations.

Either extrinsic or intrinsic evidence may be adduced for the purpose of determining the meaning of the words and clearing up the *primâ facie* equivocation, but if it should happen that such evidence is insufficient to resolve the equivocation, there is liberty to resort to extrinsic evidence for that purpose; but such extrinsic

Direct evidence of intention.

evidence differs in its nature from that already discussed: as evidence of what was passing in the minds of the parties at the time of executing the deed is not admissible for the purpose of determining the literal meaning of the words used, but is admissible to determine in which of the several literal meanings of the words used in an equivocation they were employed; it follows, therefore, that—

Direct evidence of intention to resolve equivocation.

> When after all the extrinsic and intrinsic evidence admissible under the preceding rules has been exhausted, a name or description still remains equivocal—*then, and not till then*—extrinsic evidence of what was passing in the minds of the parties to the deed at the time of execution is admissible for the purpose of determining which of the several persons or things, or classes of persons or things, described by the equivocation the parties intended, and for no other purpose whatsoever.

Evidence of the nature mentioned in this rule may be called "direct evidence of intention:" it may be defined as "evidence to prove intention itself as an independent fact."

Nature of such evidence.

Direct evidence of intention is entirely different in its nature from evidence used to determine the literal meaning of a word. It will be remembered that evidence of the latter nature is adduced for any of the purposes following, viz.: to show (1) the meaning *usually* affixed to the word at the time of execution of the deed by persons of the class to which the parties belong; or (2) the meaning in which the word must have been used by the parties having regard to their circumstances at the time of execution; or (3) the meaning which it can be conclusively shown that the parties were in the habit of affixing to the word. On the other hand, direct evidence of intention is evidence as to which of several persons or things, or classes of persons or things was *on the special occasion of framing the deed* intended by a description, which, when interpreted with the aid of evidence as to the literal meaning of the word and as construed by the context, appears to be equally applicable to any one of them.

Verbal or parol evidence.

Where Judges or text writers speak of applying "verbal" or "parol" evidence to the explanation of ambiguities or inaccuracies, they generally mean direct evidence of intention; but since the phrase "parol evidence" may mean evidence as to the literal

meaning of the words, there is a certain amount of confusion in the *dicta* of the Judges and authors, against which the reader must be on his guard. For instance, *dicta* will be found to the effect that "parol evidence" is not admissible to clear up a patent ambiguity or an inaccuracy, where all that is meant is that direct evidence of intention is not admissible for that purpose; and it is not intended to deny the admissibility of parol evidence to ascertain the literal meaning of the words employed.

Direct evidence of intention is in support of the express words.

It will be observed that this rule is not, as may at first sight appear, an exception to the rule against the admission of evidence to add to, contradict, or vary the terms of the deed. "In the case of equivocation, the general intent includes both the special, and *therefore stands with the words*:" Bacon, Elem. Rule 23; Bac. Law Tracts, p. 101. The person or thing intended is completely and correctly described, though the description applies also to another person or thing; while the rule against the admission of evidence to add to, contradict, or vary the terms of a deed, negatives the contention that, as the deed does not completely or correctly express the intention of the parties, therefore the expressed intention ought to be disregarded or supplemented on parol evidence of unexpressed intentions.

Two sons of same name.

"If a man has two sons both baptized by the name of John, and conceiving that the elder (who had been long absent), is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead" (*i.e.*, that the literal meaning of John, was John the younger), "or that he at the time of the will made, named his son John the younger" (*i.e.*, may adduce direct evidence of intention that John the younger was meant), "and the writer left out the addition of the younger; for in Y. B. 47 Edw. III. (1373) 16 b, the case was: Robert Peynel had issue two sons baptized by the name of William, and levied a fine to Sir John Fanningbridges and others *come ceo*, &c., who granted and rendered to Robert and William his son generally; and after the death of Robert, William the younger son brought a *scire facias* against the heir of William the elder; and the younger by the rule of the Court averred that the fine was levied to make him heir, *prist*, &c., and upon that, issue was taken. And no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son John, cannot be deceived by

any secret invisible averment; for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may be easily known by him who wrote the will, and others who were privy to his intent; and if no direct proof can be made of his intent, then the devise is void for the incertainty, as the render also would be in the said case of the fine as to William:" *Lord Cheyney's Case* (1591), 5 Rep. 68 at p. 68 b.

Two manors of same name.

"If a man levies a fine of the manor of Soure or of the manor of Dirtleby . . . and in truth there is the manor of North Soure and South Soure, of Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors*, which manor the conusor intended to pass, for that is matter of fact not apparent in the fine, whereof the Judge cannot take conusance; but it stands well with the fine, and shall be tried by the jury, and therewith agree *Haliwel* v. *Courtney*, Y. B. 12 Hen. VII. (1496) 6 b; Y. B. 26 Hen. VIII. (1534) 6 a:" *Altham's Case* (1610), 8 Rep. 150 b at p. 155 a.

Father and son of same name.

"And a case between *Lewknor* and *Mountague* was cited where the condition of a bond was, if William Mountague shall do, &c., whereas there was William Mountague the father and William Mountague the son, and by the averment of the meaning of the parties" (*i.e.*, by evidence of intention) "this was expounded of the son:" cited by counsel for defendant and referred to by the Court in *Buckler* v. *Millerd* (1688), 2 Vent. 107 at p. 108.

To the same effect, see (1503), Keilw. 49, pl. 6; *Davenant* v. *Rafter* (1704), 6 Mod. 235. The important case of *Doe* d. *Gord* v. *Needs* (1836), 2 M. & W. 129 (discussed in Wigram, Extr. Ev. pl. 182 (4th ed.), p. 148), is an instance of the same principle applied to the interpretation of a will.

Rule as stated by Wigram, V.-C.

The rule as to equivocations s stated with reference to wills in Wigram on Extrinsic Evidence (4th ed., p. 12, pl. 19, prop. vii. and see pp. 109 *et seq.*), in the following terms:—

"*Proposition VII.*—Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined:—Where the object of a testator's bounty, or the subject of disposition (*i.e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove

which of the persons or things so described was intended by the testator."

Incorrect statement of rules as to admission of evidence to explain ambiguity.

The rule as to the admissibility of evidence to explain ambiguities, including equivocations, is commonly stated as follows:—"In a written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, though a *latent ambiguity* is so:" Smith on Contracts (8th ed.), p. 49. See also Smith's Law of Property (6th ed.), pp. 1016, 1115; Chitty, Contr. (14th ed.), p. 109. Many *dicta* of Judges and even judicial decisions will be found to the same effect.

The rule as thus stated is incorrect, for the following reasons:—(1) In all cases of ambiguity, whether patent or latent, extrinsic evidence is admissible to ascertain the literal meaning of the words, and until such evidence is adduced it is impossible to say whether the instrument is ambiguous or not: see Wigr. Ex. Ev. 179, pl. 203. (2) Direct evidence of intention is admissible for the purpose of explaining an equivocation, but not a patent ambiguity. It is to be observed also that by the phrase "latent ambiguity" in the foregoing quotation is meant an equivocation; but the books often use the phrase in a wider sense, including any doubt raised by the application of extrinsic evidence, whether it be what is more properly called an inaccuracy, or a mere *primâ facie* case of ambiguity, which is ultimately solved by the further application of evidence, other than direct evidence of intention.

There is an inaccuracy of language which must be distinguished from an ambiguity, namely, where the writer in one place makes a general, and in another place a specific statement of his intentions. If a man says, "I am going to France," and in another place says, "I am going to Paris"; although the statement resembles a patent ambiguity in form, there is no ambiguity—all that the writer has done is in one place to state his intention with vagueness, and in another place with accuracy. Hence the following rule—

General joined with particular statement.

> Where a deed contains both a general, vague, or indefinite, and also an exact, particular, or definite statement, not inconsistent with the former, the latter must prevail.

"Et la ou fait parle p. parolx generals & puis disc̄ en polx especials si les polx especials accordent a les parols generals le fait serra entendu solongz les parolx especials:" Y. B. 7 Edw. III. (1333) 9 b, pl. 20 at p. 10 a.

"*Quando carta continet generalem clausulam posteaque descendit ad verba specialia quae clausulae generali sunt consentanea interpretanda est carta secundum verba specialia;*" *Altham's Case* (1610), 8 Rep. 150 b at s. 154 b.

Parcels.

Thus where property is conveyed both by a general and specific description, only that specifically described will pass: *Lord North* v. *Bishop of Ely* (1576), cited 1 Buls. 100; *Doe* d. *Meyrick* v. *Meyrick* (1832), 2 Cr. & J. 223; *Griffiths* v. *Penson* (1863) 1 N. R. 330; 9 Jur. N. S. 385.

Policy.

A policy of life assurance was entered into, founded on a written declaration of the assured, which was agreed to be the basis of the contract between the parties, and which contained a proviso that "if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue, or if, &c., then the policy should be void." The proposal and declaration contained the usual particulars, and proceeded as follows: "I do hereby declare that the above-written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract between me and" the office, "and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein," then the policy to be void. *Held*, that the policy was not avoided by an untrue statement in the declaration unless designedly untrue: *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S. 917.

naccuracies.

It is hardly necessary to observe that it is impossible to perceive that a description is inaccurate until there has been applied extrinsic evidence to ascertain the literal meaning of the words, as well as such intrinsic evidence, if any, as is afforded by the deed under consideration. This is why inaccuracies are sometimes incorrectly spoken of as "latent ambiguities," when that expression is used in a wide sense, and not as synonymous with equivocations.

The discussion of the more common forms of inaccuracies in the different clauses of deeds, will be found in this book under the appropriate headings. In this place the general rules only will be noticed.

Where neither whole description nor any part applies.

If neither the description as a whole, nor any part of it, renders it certain what object was intended, no meaning can be affixed to the words employed, and the deed or clause is void for uncertainty.

"If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in formâ praedicta*, this remainder is void for the incertainty:" Co. Litt. 20 b.

Limitation to "*A. et B. et haeredibus*" without the word "*suis*"; this is only an estate for their lives, for the uncertainty whose heirs are to take: Co. Litt. 8 b; Shep. Touch. 101.

Husband and wife hold an acre of land jointly of A. for their lives: A. grants the reversion of the acre which the husband alone holds for his life; the grant is void, as no lands satisfy the description: Shep. Touch. 250.

Conveyance of "all those trees which could then reasonably be spared." *Held*, void for the uncertainty: *Merryn* v. *Lyds* (1554), Dy. 90 a.

An agreement to retire from a business so far as the law allows. *Held*, void for uncertainty: *Davies* v. *Davies* (1887), 36 Ch. D. 359.

Where part of the description renders it certain what is intended.

If the description as a whole fits no object, but part of the description renders it certain what is intended, the rest of the description may be rejected. Shep. Touch. 247.

In *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1 (*arg.* at p. 13), the case is put "where, under a limitation to heirs of a particular description, by purchase, a person apparently intended, though not exactly answering both parts of the description, has been allowed to take:" citing *Pybus* v. *Mitford* (1674), 1 Vent. 372; 1 Freem. 351, 369; 2 Lev. 75; *Newcomen* v. *Barkham* (1716), 2 Vern. 729; S. C. *sub nom. Brown* v. *Barkham*, Pre. Ch. 442, 461; *Wills* v. *Palmer* (1770), 5 Burr. 2615 *et seq.*; *Burtenshaw* v. *Weston* (1772), Fearne, App. 570.

In the application of this rule it must be remembered that words must be taken in their *literal* meanings, so that the same words may bear different meanings according to the circumstances of the person using them. The expression "all the lands in A. purchased from S.," would vary in its meaning according as lands in A. had or had not been purchased from S. If some lands in A. had been purchased from S., the latter words would be restrictive, but if no land in A. had been purchased from S., they would have to be rejected.

Where the part of the description

If the part of the description which gives certainty, applies to more than one object, there is a case of

which gives certainty applies to more than one object.

equivocation, and direct evidence of intention is admissible.

Grant by deed of "all the coal mines in the lands in the occupation of K. & Son." It was shown that the grantor had not any lands at the time of making the grant "in the occupation of K. & Son." These words were rejected, and letters written by the grantor's steward to the grantees prior to the grant were permitted to be given in evidence to show what mines were intended: *Beaumont* v. *Field* (1818), 1 B. & Al. 247.

Part of description applying to one, part to another, but the whole applying to no object.

If one part of the description applies to one object, and another part applies to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity and direct evidence of intention is not admissible.

There does not appear to be any case in which this rule has been applied to a deed, but the rule is founded on the cases on wills of which *Doe* v. *Hiscocks* (1839), 5 M. & W. 363, is the leading example.

Id certum est quod certum reddi potest.

Of course the maxim *id certum est quod certum reddi potest* applies to descriptions of persons and things and classes of persons and things in deeds as in every other document.

"The certaintie of the lands or tenements to be conveyed by the feoffment either by express words or which may by reference be reduced to a certaintie for *certum est quod certum reddi potest:*" Co. Litt. 6 a.

Recapitulation

To recapitulate: A person perusing a deed, without knowing the circumstances of the parties, will detect the patent ambiguities, he will not detect equivocations or inaccurate descriptions, and he may or may not detect those latent ambiguities which are not equivocations. On the application of extrinsic evidence of the circumstances to determine the literal meaning of the words, and on interpreting the words according to the context, the patent ambiguities may disappear, the inaccuracies and latent ambiguities, including equivocations, will become manifest, and may subsequently disappear. If any equivocations remain, they may be resolved by direct evidence of intention. If, after this process has been gone through, there remain any ambiguities of either class, or any inaccuracies which are not made clear, no interpretation can be put on the deed.

An example may render this more clear. A grant of land to "A.'s nephew J. living at S." has to be construed.

First, evidence, either extrinsic, showing that A. had no nephew, but a grand-nephew named J., or intrinsic, viz., the context of the deed, may show that by "nephew" is meant "grand-nephew."

Next, the extrinsic evidence adduced to show that "nephew" must be read "grand-nephew" may also show that A. has two grand-nephews, both named J., but that neither of them lives at S. Thereupon, the description, "living at S.," may be rejected as being a mere inaccurate addition. There results an equivocation, and if that cannot be cleared up by applying further extrinsic evidence other than evidence of intention, as, *e.g.*, that the grantor only knew of one grand-nephew, or further intrinsic evidence from the context, then in the last resort, direct evidence of intention may be adduced to determine which of the two grand-nephews named J. was intended by the grantor.

CHAPTER VII.

MISCELLANEOUS GENERAL RULES.

The Expression of Implied Terms has no Effect: Express Provisions exclude Implication: Words to be taken Against the User: Except in the case of the King.

THERE are certain miscellaneous general rules applying to the interpretation of all deeds, which are collected here.

Expression of implied terms is nugatory.

The expression of a clause that the law implies has no effect.

Expressio eorum quae tacite insunt nihil operatur: Co. Litt. 191 a, 205 a; 2nd Inst. 365. *Expressio eorum quae tacite insunt nihil operatur, et expressa non prosunt quae non expressa proderunt: Boroughe's Case* (1597), 4 Rep. 72 b at p. 73 b.

Gift in tail.

"If a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a voyd condition; for when the issues fail, the estate determineth by the expresse limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate is void, and in that case the wife of the donee shall be endowed:" Co. Litt. 224 b.

Reservation of rent in a lease for years to the lessor during his life and his assigns. *Held*, that the reservation to the assigns had no effect, because the addition of assigns is implied by law: *Sury* v. *Cole* (1627), Latch, 44 and 255; Pal. 481; S. C. *sub nom. Sury* v. *Brown*, Latch. 99; *Wotton and Edwins' Case* (1607), cited 1 Vent. 162.

Joint tenancy.

"If lands be letten to two for terme of their lives, *et eorum alterius diutiùs viventi*, and one of them granteth his part to a stranger, whereby the joynture is severed, and dyeth, here shall be no survivour, but the lessor shall enter into the moity, and the survivour shall have no advantage of these words *et eorum alterius diutiùs viventi*, for two causes. First, for that the joynture is severed. Secondly, for that those words are no more than the Common Law would have implied without them:" Co. Litt. 191 a.

Feoffment reserving rent to the feoffor, "and if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter." It is not necessary to insert the power of re-entry because the feoffor and his heirs can do so by force of the reservation. "*Quae dubitationis causa tollendae inseruntur, communem legem non laedunt. Et expressio, &c.:*" Litt. ss. 330, 331: Co. Litt. 205 a.

Leases.

"The clause of distress (in a lease) is no otherwise to be extended than as the grantor gives it; and therefore if the clause were, 'if the rent be behind, being demanded at another place besides the land, or of his person, then he may distrain,' clearly then he could not distrain without such a demand made first, for there the demand is other than the law requires. But where the clause is no more but 'if the rent be behind being lawfully demanded, then he may distrain,' it is no more than the law speaks; and therefore the distress implying a demand and distress, one before another, by operation of law satisfies it:" *Browne* v. *Dunnery* (1617), Hob. 208.

Ejectment on a proviso for re-entry contained in a lease on the rent being in arrear for twenty-one days, *being lawfully demanded.* The Act 4 Geo. II. (1730) c. 28, provides that when half a year's rent is in arrear, and the lessor has a right by law to enter for non-payment, he may without a formal demand or entry sue in ejectment. *Held*, there being five quarters in arrear, that it was not necessary to make a demand of the rent on the premises before bringing the ejectment. Dampier, J., said: "The right to re-enter grows out of the stipulation of the parties. A demand is necessary as a consequence of law, and there was the same necessity for a demand before the statute whether the lease contained the words 'lawfully demanded' or not. Therefore the maxim applies; *Expressio &c.:*" *Doe* d. *Scholefield* v. *Alexander* (1814), 2 M. & S. 525 at p. 532.

Mortgages.

Where a mortgage-deed expressly secured the mortgagees' expenses and interest: *Doe* d. *Scruton* v. *Snaith* (1832), 8 Bing. 146; 1 Moore & Scott, 230; the payment by the mortgagor of all taxes on the mortgaged property: *Doe* d. *Merceron* v. *Bragg* (1838), 8 Ad. & El. 620; 3 Nev. & P. 644; fines for renewals if paid by the mortgagee: *Wroughton* v. *Turtle* (1843), 11 M. & W. 561; the expenses incurred by the mortgagee in keeping up a policy of life insurance comprised in the security: *Lawrance* v. *Boston* (1851), 7 Ex. 28; it was held, that as in each of these cases the moneys expended by the mortgagee for these

purposes would have been charged by the law without any express words, the rule applied, and that consequently the deed did not require any *ad valorem* stamp in respect of the moneys so expended.

Unnecessary words apparently restrictive.

The rule is applied where the words state only part of that which the law implies, so that they appear at first sight to be restrictive.

"Mountague asked this question: A man makes a lease for a term of years by indenture, and the lessor covenants and grants to the lessee, 'that he shall have thorns for hedges growing upon the land, *by the assignment of the bailiff* of the lessor, *and necessary fuel* to burn in his house.' First, whether the lessee can take thorns *without the assignment* of the bailiff, or not? Secondly, if by the copulative (*and necessary fuel*) that shall refer to the *assignment of the bailiff*, or not? For the first, it seemed to Baldwin and Fitzherbert, that the lessee, by virtue of his lease, may well cut thorns without assignment by the order of the law; for by our books the law is, that a termor shall have loppings and shrowdings of trees for necessary fuel; and then to insert these words, 'that he shall have fuel *by the assignment of his bailiff*' is void, for what the law gives him by implication in the lease, that he may take without assignment. For, if I lease to one, two acres of meadow, and that it shall be lawful for the lessee to cut the grass *at the assignment of the lessor*, notwithstanding these words, the lessee may cut the grass. But if the other covenant on his part in a negative, 'that he will not take thorns without the assignment of the lessor,' now that is a good covenant, and if he do contrary to that, action of covenant well lies. Or if it were a condition which is a negative in law, as, 'proviso that he shall not take thorns without, &c.,' now if he do that, clearly the lessor may enter, &c. But in the other case, it is a grant on the part of the lessor in the affirmative. Wherefore, &c: Shelley *è contrà;* for when a man takes a lease out of the order of the law, viz., by special words and terms, he shall have it as if the lessor spoke the words, and no otherwise. Wherefore here he hath accepted the lease by such words, 'that he shall have thorns by the assignment of the bailiff;' that is as much as to say, he shall not have them without the assignment. Wherefore, &c. And as to the other point, it seemed to him that this copulative (*and*) should make the fuel pass by assignment, &c.:" *Anon.* (1536), Dyer, 19 b, pl. 115.

Grants.

S. bargains and sells to G. all the trees growing in and on a manor, and covenants that G. might within five years fell and carry away the trees, &c. *Held*, that G. might cut and carry away the trees after the five years, as the power to fell them implied by the grant could not be restrained by expressly giving the grantee the same power: *Stukeley* v. *Butler* (1614), Hob. 168, see p. 173; Moore, 880.

A. granted to B. liberty to carry a sough or drain through A.'s ground and liberty to make two little sough pits in A.'s ground for the more easy and safe carrying up the tail of the sough. *Held*, that with the liberty of making a sough in A.'s land, there passed as incident thereto the liberty of making sough pits at any time afterwards while the object of the grant remained, such sough pits being necessary for the purpose of repairing the sough. And that the special liberty of making two sough pits did not control the liberty of making new sough pits for necessary repairs of the sough: *Hodgson* v. *Field* (1806), 7 East, 613.

Feoffment by D. of certain closes reserving unto D. and his heirs all the coals, with liberty for D., his heirs and assigns at all times thereafter, "during the time that D. and his heirs should continue owners of F.," to sink pits, &c. *Held*, that D. could get coals under the reservation in fee, and that the express liberty to get the coals was not restrictive of that which would be implied: *Cardigan* v. *Armitage* (1823), 2 B. & C. 197.

Unnecessary words may alter construction of subsequent clause.

But the expression of unnecessary words may alter the construction of a subsequent clause.

"Though the law say, that when a man grants lands, he grants the underwoods inclusively, and so when he grants his house, he grants all the several rooms in the house, yet 33 & 34 Eliz. (1591), in the King's Bench, between *Kenisham* and *Redding*, the case was, that the Queen leased the Parsonage of Greenwich, with all the lands and underwoods expressly thereunto belonging, *exceptis omnibus grossis arboribus boscis*" (*i.e.*, timber and underwood) "*et maeremiis*" (*i.e.*, timber fit for building). The opinion of the Court was that the exception as to underwoods was void. But they held that the exception was only to be extended to great woods. So is the case 9 Eliz. (1567) 265, of a lease of a house and shops, excepting the shops, which proves that the rule '*expressio eorum*,' &c., is to be understood having reference to itself only, and not having relation to other clauses:" per Hobart, C.J., *Stukeley* v. *Butler* (1614), Hob. 168 at p. 170; S. C. *sub nom. Stewkly* v. *Butler*, Moore, 880.

An express provision excludes implication.

An express provision excludes the implication of any provision to the same effect.

Semper expressum facit cessare tacitum : Co. Litt. 183 b ; *et in hoc casu designatio unius personae est exclusio alterius, et expressum facit cessare tacitum :* Co. Litt. 210 a.

" Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications : the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument :" per Lord Denman, C.J., *Aspdin* v. *Austin* (1844), 5 Q. B. 671 at p. 684.

" If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised under other circumstances than those so defined ; *expressio unius est exclusio alterius* : " per Willes, J., *North Stafford Steel, &c. Co.* v. *Ward* (1868), L. R. 3 Ex. 172 at p. 177.

Conveyance.

Conveyance of an iron foundry and two dwelling-houses and the appurtenances, together with the fixtures in the dwelling-houses. *Held*, that the fixtures in the foundry did not pass : *Hare* v. *Horton* (1833), 5 B. & Ad. 715.

Habendum.

" If a lease be made to two, habendum the one moity to the one, and the other moitie to the other, the habendum doth make them tenants in common ; and so one part of the deed doth explaine the other, and no repugnancy between them, *et semper expressum facit cessare tacitum :* " Co. Litt. 183 b.

Covenant.

A trustee mortgaged lands and covenanted for payment out of the moneys which should come to his hands as trustee. *Held*, that he was not personally liable : *Mathew* v. *Blackmore* (1857), 1 H. & N. 762. The Court said (pp. 771—772) : " The question is, whether a contract by parol can be implied for the repayment where there is an express covenant under seal relative to it. The rule of law, as well as of reason and good sense, is, '*expressum facit cessare tacitum*,' and where there is an express covenant that the defendant shall, out of the trust funds which shall come to his hands and the personal estate of his testator (which was not included in the mortgage security) pay the sum advanced, we think it impossible to conclude that at the same time he made himself absolutely liable for the payment of it *simpliciter ;* and at all events to do so would be to create a contract by implication different from, and much more onerous than, that entered into by the express words used,

and this against a trustee having no personal interest whatever in the transaction."

The covenants implied by the word "demise" are restricted by an express qualified covenant for quiet enjoyment: *Noke's Case* (1599), 4 Rep. 80 b; *Merrill* v. *Frame* (1812), 4 Taunt. 329; *Line* v. *Stephenson* (1838), 5 Bing. N. C. 183. The cases are further discussed *infrà*, Chapter on Qualified Covenants and Covenants for Title. "Demise."

The words in a deed are to be construed most strongly against him who uses them, if so doing works no wrong. Words to be taken against the person using them.

This rule is often misunderstood: it does not mean that the words are to be twisted out of their proper meaning, but only that where the words may properly bear two meanings, and where, after all admissible evidence, whether extrinsic or intrinsic, has been applied, it still remains uncertain in which of those meanings the words were used, the meaning most disadvantageous to the person who uses them is to be taken, unless so doing would work a wrong (as to the meaning of which see the quotation from Coke, *infra*).

The reason for the rule is that "the principle of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning, and all manner of deceit is hereby avoided in deeds: for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them:" Cruise Dig. tit. 32, c. 19, s. 13; and to the same effect is Shep. Touch. 87. Reason for rule.

"A., tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for terme of life, without mentioning for whose life it shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said, an estate for a man's own life is higher than for the life of another. But if tenant in taile make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons. Lease for life.

"First, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong Working a wrong.

Working a wrong.

is wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken.

"Secondly, the law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life:" Co. Litt. 42 a and 42 b.

"If a man make a charter in fee and deliver seisin for life, *secundum formam cartae*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor:" Co. Litt. 48 a.

"It is a maxime in law, that every man's grant shall be taken by construction of law most forcible against himself. *Quaelibet concessio fortissimè contra donatorem interpretanda est*, which is so to be understood, that no wrong be thereby done; for it is another maxime in law, *Quod legis constructio non facit injuriam*. And therefore if tenant for life maketh a lease generally, this shall be taken by construction of law an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. And so it is if tenant in taile make a lease generally, the law shall contrive this to be such a lease as he may lawfully make, and that is for terme of his owne life; for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong:" Co. Litt. 183 a, 183 b.

"A release in deed, which is the act of the partie, and shall be taken most strongly against himselfe:" Co. Litt. 264 b.

"For in the Common Law the grant of every common person is taken most strongly against himself and most favourably towards the grantee:" per Weston, J., *Willion* v. *Berkley* (1562), Plow. 223 at p. 243.

"The principle of construction which has been so strenuously contended for, viz., that the terms of a grant are to be construed as favourably as possible for the grantee, the Court is not disposed to controvert:" per Wilde, C.J., *In re Stroud* (1849), 8 C. B. 502, at p. 529.

"In the first place it is to be observed that all deeds are to be construed most strongly against the grantor:" per Lord Romilly, M.R., *Johnson* v. *Edgware, &c. Ry. Co.* (1866), 35 B. 480 at p. 484.

"It is well settled that the words of a deed, executed for valuable

consideration, ought to be construed as far as they properly may in favour of the grantee": per Lord Selborne, L.C., *Neill* v. *Devonshire* (1882), 8 Ap. Ca. 135 at p. 149.

Construction of exception.

"It is a rule of construction, that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor, and are to be construed in favour of the grantee:" per Holroyd, J., *Bullen* v. *Denning* (1826), 5 B. & C. 842 at p. 850.

"It is a settled rule of construction that where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor and to be construed in favour of the grantee. If then the grant be clear but the exception be so framed as to be bad for uncertainty, it appears to us that on this principle the grant is operative and the exception fails:" per Stirling, L.J., *Savill Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523 at p. 537, in which case an exception of "a piece of land not less than forty feet in width commencing at a point A and terminating at the nearest road *to be made*" by the grantee, was held void for, amongst other grounds, uncertainty.

Warranty.

Thus a warranty of land generally, without saying against everybody, is a warranty against everybody, for it is either against everybody or nobody, and the words must be read against the warrantor: *Buckhurst* v. *Dacres* (1598), 2 And. 118.

Leases.

Land being leased for thirty-one years, four years after the beginning of the term the lessor granted a new lease to another person as follows: "Know that I, the aforesaid thirty-one years being completed, have demised and granted all the premises, &c., habendum from the day of the making of these presents, the term aforesaid being first finished until the end of the term of thirty-one years then next ensuing." *Held*, that the term should begin after the termination of the term of thirty-one years, as otherwise the lessee would only have a lease for four, not thirty-one, years, and every grant shall be expounded most strongly for the grantee: *Anon.* (1566), Dy. 261 b, pl. 28.

A man makes a lease of Blackacre to A. for ten years, and of Whiteacre to B. for twenty years; and afterwards by indenture, reciting the former leases, demises both Blackacre and Whiteacre to another for forty years, to begin after the end and determination of the said several leases made to A. and B. Afterwards the former lease of Blackacre ends during the currency of the lease of Whiteacre; it was held, that the habendum in the latter lease was to be taken *respective* and that the new term for forty years in Blackacre

began immediately on the determination of the term of ten years in it granted by the former lease, on the ground that "every deed shall be taken more strongly against the grantor, and more beneficially for the grantee, and it is more strong against the lessor and more beneficial for the lessee to have the lease in Blackacre to begin presently after the expiration of the first lease made thereof, than to tarry till the lease of Whiteacre be ended. If I release unto you all actions which I have against you and another, in this case, notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it:" *Justice Windham's Case* (1589), 5 Rep. 7 at p. 7 b.

Lessee for 100 years made a lease for forty years to T. S., if he should so long live: and afterwards he demised it to John, "habendum after the term of forty years, for the term of twenty-three years to be computed from the date of these presents." *Held*, that the lease to John should commence from the expiration of the lease to T. S., on the ground that, if the limitation be not certain when the term shall begin, it shall be taken most beneficially for the lessee: *Seaman's Case* (1610), Godb. 166.

In a lease for twenty-one years, there was a covenant that the lessee should have the land for twenty-one years more after the expiration of the said term, and "so from twenty-one years to twenty-one years, until ninety-nine years past thence next ensuing shall be complete and ended." The question arose whether the first twenty-one years were included in the ninety-nine; and Dolben, J., said: "the words, 'from thence next ensuing,' may be referred to the beginning of the first term, or to the end of it;" whereupon Scroggs, C.J., said: "therefore it standing so indifferent, we ought to construe it most strongly against the grantor," and the Court decided that the first twenty-one years were not to be computed in the ninety-nine: *Manchester College* v. *Trafford* (1679), 2 Show. 31; 2 Lev. 241.

Lease and release.

In *Doe* d. *Davies and Williams* v. *Williams* (1788), 1 H. Bl. 25, where a conveyance was made by lease and release of the Clock Mills, "and all lands and meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed, taken or accepted as part thereof," the rule was applied in order that three acres of leasehold land, which had for thirty-seven years been held with the Clock Mills, should pass.

Covenants.

The rule has been applied to the construction, of covenants for quiet enjoyment and title: *Broughton* v. *Conway* (1564), Dyer, 240;

Gainsford v. *Griffith* (1667), 1 Saund. 60; *Howell* v. *Richards* (1809), 11 East, 633; *Barton* v. *Fitzgerald* (1812), 15 East, 530; but see *Nind* v. *Marshall* (1819), 1 Brod. & Bing. 319; of covenants by a lessee: *Barrett* v. *Bedford* (1800), 8 T. R. 602; *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, per Holroyd, J., at p. 751; of a proviso in a lease: *Doe* d. *Abdy* v. *Stevens* (1832), 3 B. & Ad. 299; of the words "for seven, fourteen, or twenty-one years," in an agreement for a lease: *Dann* v. *Spurrier* (1803), 3 Bos. & Pul. 399; and of similar words in a lease: *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 15.

Where the grantor takes an interest under his own grant, the deed will be construed as if a stranger were the grantor: *Vincent* v. *Spicer* (1856), 22 Beav. 380.

Objections to rule.

The rule was objected to by Jessel, M.R., who said (*Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. 264 at p. 270): "I do not see how, according to the now established rules of construction, as settled by the House of Lords, in the well-known case of *Grey* v. *Pearson* (1857), 6 H. L. C. 61, followed by *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823, and *Abbott* v. *Middleton* (1858), 7 H. L. C. 68, that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled."

Who is the person using the words?

In Shep. Touch. p. 87, note (81), and 2 Bl. Com. Bk. II. c. 23 (3rd ed. p. 380), citing Plowd. 134, a distinction is drawn between an indenture and a deed-poll to the effect, that as the latter is executed by the grantor alone, and the words are his only, it should therefore be taken most strongly against him; but that as an indenture is executed by both parties, the words are to be considered those of them both: see *Scovell and Cavel's Case* (1588), 1 Leon. 317 at p. 318. It seems, however, that these remarks require to be supplemented by the explanation that, as regards indentures, the law will consider the words to be spoken by him who can properly speak them.

"First, it is to be considered that the lease and also the covenant and grant to pay the sum, is made by indenture, and the words in an indenture are the words of both parties; and although they are spoken as the words of one party only, yet they are not his words alone, for there is the assent of the other party to each other's

words; and therefore, when they are written, they shall be taken in such manner as the intent of the parties may be supposed to be. And they shall not be taken most strongly against one and beneficially for another, as the words of a deed-poll shall, for there the words shall be taken most strongly against the grantor, and most available to the grantee. But it is not so in a deed indented, because the law makes each party privy to the speech of the other; and therefore we ought not to make such construction of words in an indenture as in a deed-poll. But if an indenture contains matter of substance, the law will make such reference thereof as is most fit and reasonable, and will say that the words are spoken by him who could most properly speak them; and therefore, where the plaintiff here has covenanted and granted to render and pay the said sum for the lands, the words are in fact the words of the lessee, but in construction of law they shall be taken as the words of reservation of the lessors, inasmuch as they have the sense and effect of a reservation. For words of covenant and grant to render and pay such a sum for the land have the effect of reserving or paying rent for the land, and so the law will take them to be spoken by the lessors. As if a man make a feoffment in fee by deed indented rendering such rent, there it ought to be considered that it cannot be reserved as a rent may upon an estate for years, for life, or in tail, because the reversion is not in the feoffor, and yet the feoffor shall have it as a rent granted by the feoffee. And by the same reason that the law there takes the words of the feoffor as the words of the feoffee, by the like reason in our case it will take the words of the lessee as the words of the lessor, for they serve most properly that way. And if the deed indented had specified that the plaintiff should have the land, and should pay 20*s*. yearly, that would be a rent, for the law refers the words in any writing indented to be spoken by him that can best speak them:" per Staunford and Walsh, *arguendo*, *Browning* v. *Beston* (1552), Plowd. 131 at p. 134.

There is, however, an exception to the rule, for—

The King's grant.

> "The King's grant is taken most strongly against the grantee, and most favourably for the King, although the thing which he grants came to the King by purchase or descent:" per Weston, J., *Willion* v. *Berkley* (1562), Plowd. 223 at p. 243.

The reason for mentioning the case where the King takes by

purchase or descent is to show that the rule applies not only to Crown lands.

A grant by the Crown of "lands" and "mines" does not pass ores royal or mines royal; *contrà*, if the King grant all mines which he has in the lands of A., and has a royal mine there, for the King cannot be deceived in his grant: *Reg.* v. *Northumberland, the Case of Mines* (1568), Plowd. 310.

Where the King, being seised of two manors, A. and B., granted "*totum illud maner' de A. & B.*," or "*totum illud maner' de A. cum B.*," it was held that neither manor passed: and where the King granted all the demesne lands of a manor, it was held that copyholds parcel of the manor, did not pass: *Case del Alton Woods* (1600), 1 Rep. 26 at pp. 46 a, 46 b.

If the King grants "*the manor of D., which he hath by the attainder of A.*," and in truth he hath it not by his attainder, the grant is void: *Case del Alton Woods, ubi sup.* at p. 52 a.

No election against King.

If the King grants 120 acres of his waste in D. and the waste contains 300 acres, the grant is void, for there is no election against the King: *Brand* v. *Todd* (1618), Noy, 29.

This exception is further discussed in: *Reg.* v. *Imber* (1579), 2 Roll. Abr. 186; *Bozoun's Case* (1584), 4 Rep. 34; *Green's Case* (1602), 6 Rep. 29 a; *Mason* v. *Chambers* (1604), Cro. Jac. 34; Yelv. 42; *Chandos' Case* (1606), 6 Rep. 55; *Auditor Curle's Case* (1609), 11 Rep. 2 b; *Whistler's Case* (1612), 10 Rep. 63; *Mead* v. *Lenthal* (1637), 2 Roll. Abr. 189; *Attorney-General* v. *Hungate* (1662), Hard. 231; *Holland* v. *Fisher* (1662), O. Bridg. 181; *The King* v. *The Bishop of Rochester and Sir F. Clerke* (1675), 1 Mod. 195; 2 Mod. 1; Freeman, K. B. 172, 178; 3 Keble, 412; *Lee* v. *Browne* (1676), Freeman, K. B. 207; *Attorney-General* v. *Farmer* (1676), Sir T. Raym. 241; 2 Lev. 171; S. C. *sub nom. Attorney-General* v. *Turner*, 2 Mod. 106; *R.* v. *Bishop of Chester* (1697), Ld. Raym. 292; Show. P. C. 212; *The King* v. *Capper* (1817), 5 Pri. 217; *Attorney-General* v. *Marquis of Downshire* (1818), 5 Pri. 269; *Attorney-General* v. *Ewelme Hospital* (1853), 17 B. 366 at p. 386, and other cases cited in Cruise, Dig., vol. 5, tit. xxxiv.; and also in Chitty on Prerogatives of the Crown, p. 391.

CHAPTER VIII.

EXTRINSIC EVIDENCE INADMISSIBLE TO ADD TO DEEDS.

Extrinsic Evidence inadmissible to add to Deeds: but admissible to show Date, Consideration, or that Deed is one of a Series: or to prove Collateral Agreement, or Terms implied by Custom or Usage: or to show that Deed is not binding: Subsequent Admissions or Conduct inadmissible.

A FURTHER rule relating to the interpretation of deeds is that the deed only is to be construed, and that—

Extrinsic evidence inadmissible to add to or alter deed.

No evidence of extrinsic circumstances is admissible to add to, contradict, vary, or alter the terms of a deed.

This rule is not, properly speaking, a rule of interpretation; it is a rule of law limiting the subject-matter to be interpreted to that contained in the deed itself.

"It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by the averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted:" *The Countess of Rutland's Case* (1604), 5 Rep. 25 b at p. 26 a.

"To add anything to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the Statute of Frauds and Perjuries, but to the rule of Common Law, before that statute was in being:" per Lord Hardwicke, C., *Parteriche* v. *Powlet* (1742), 2 Atk. 383 at p. 384.

"The rule is perfectly clear, that where a deed is in writing, it will admit of no contract that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence:" per Lord Thurlow, C., *Lord Irnham* v. *Child* (1781), 1 Br. C. C. 92 at p. 93; 2 Dick. 554.

"It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the specific agreement which they have executed; and for this reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed:" per Lord Loughborough, C.J., *Haynes* v. *Hare* (1791), 1 H. Bl. 659 at p. 664.

"I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed:" per Park, J., *Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473 at p. 541.

No evidence of negotiations.

"By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted on what will be thus left of the written agreement:" per Lord Denman, C.J., *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58 at p. 64; and Stephen, Dig. Ev. Art. 90.

New contract may be made.

Contract followed by deed.

"If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing, or modifying the contract which is to be found in the deed itself:" per James, L.J., *Leggott* v. *Barrett* (1880), 15 Ch. D. 306 at p. 309; and per Brett, L.J., at p. 311.

Draft cannot be read.

"No claim is made to rectify this deed. The drafts cannot, therefore, properly be received in evidence to alter its language;

still less to explain or assist in the interpretation of the deed as finally executed:" per Lord Lindley, *National Bank of Australasia* v. *Falkingham & Sons*, [1902] A. C. 585 at p. 591.

Bond.

Thus evidence was not admitted to show that the condition of a bond did not express the agreement between the parties: *Buckler* v. *Millerd* (1688), 2 Vent. 107; *Mease* v. *Mease* (1774), 1 Cowp. 47; *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792; 3 N. & M. 603.

Settlement.

Where a conveyance was made to A. upon trust to convey to B. evidence that B. was not to be able to alienate was rejected: *Lake* v. *Phillips* (1637), 1 Rep. in Ch. 110.

Where marriage articles provided that within six months after the marriage the husband should cause certain lands to be conveyed to him in fee so that the wife should become entitled to dower, and by the settlement executed pursuant to the articles, a jointure was given to the wife in lieu of dower, evidence was not admitted to show the reason of the change: *Brydges* v. *Duchess of Chandos* (1794), 2 Ves. Jr. 417 at p. 422.

Conveyance to trustee.

Where a son conveyed to his father nominally as purchaser, but really as a trustee, and afterwards the father made a will containing a general devise, the son was not permitted after his father's death to adduce parol evidence to prove the trust: *Leman* v. *Whitley* (1828), 4 Russ. 423: but it may be doubted whether this case is good law. See Sugden on Vendors and Purchasers (14th ed.), p. 702; and see per Stirling, J., *In re Duke of Marlborough* (1894), 2 Ch. 133 at pp. 142, 145. The evidence was of a fact consistent with the deed.

Where land in lease was conveyed by deed, evidence of a contemporaneous parol agreement between the parties to apportion the rents up to the time of purchase was not admitted: *Flinn* v. *Calow* (1840), 1 Man. & Gr. 589.

Conditions of sale.

Conditions of sale not admitted to restrict the parcels in the purchase deed: *Doe* d. *Norton* v. *Webster* (1840), 12 Ad. & El. 442; 4 P. & D. 270.

Contract for sale.

A preliminary agreement not admitted to enlarge the parcels in a purchase deed: *Williams* v. *Morgan* (1850), 15 Q. B. 782.

Occupation.

Conveyance of "all that messuage, &c., called G. Farm, in the occupation of, &c., and containing, &c., and consisting of the several particulars specified in the schedule, and delineated on the map in the margin." Evidence not admitted to show that a slip of land not mentioned in the schedule or delineated in the plan had always been occupied as part of the farm: *Barton* v. *Dawes* (1850), 10 C. B. 261.

Where mortgages purported to be transferred in consideration of the sums due, evidence was not admitted to show that the transfers were gifts of the mortgage debts: *Cowlishaw* v. *Hardy* (1857), 25 Beav. 169 at p. 175.

Draft referred to in recitals.

A deed recited certain intended testamentary dispositions, and that a draft will had been prepared to carry them out; the grantor then disposed of certain property in accordance with the intentions as recited; the recital of the intentions was inconsistent with the draft will. *Held*, that the draft could not be looked at to correct the recital and disposition of the property: *Re Carter's Trusts* (1869), Ir. R. 3 Eq. 495.

Map.

A map attached to, but not referred to in, a conveyance, not admitted to explain it: *Wyse* v. *Leahy* (1875), I. R. 9 C. L. 384.

Where land was purchased by justices, and the conveyance was made to the clerk of the peace in "trust for the justices of the county of M., for the purposes of the Prison Act, 1865," evidence as to the resolutions passed by the justices prior to the purchase was held inadmissible to prove that the land was not purchased for the purposes of the Prison Act: *The Prison Commissioners* v. *The Clerk of the Peace for Middlesex* (1882), 9 Q. B. D. 506.

Contract for sale.

Contract for sale not admitted to import reservation into conveyance: *Teebay* v. *Manchester, &c. Ry. Co.* (1883), 24 Ch. D. 572.

Annuity deed.

Evidence of omission of a proviso for redemption of an annuity was refused, no fraud being alleged: *Lord Irnham* v. *Child* (1781), 1 Bro. C. C. 92; 2 Dick. 554; *Portmore* v. *Morris* (1787), 2 Bro. C. C. 219; *Hare* v. *Shearwood* (1790), 1 Ves. Jr. 241; 3 Bro. C. C. 168; *Haynes* v. *Hare* (1791), 1 H. Bl. 659.

Agreement.

Specific performance of a written agreement for a lease with a parol variation of one term refused: *Rich* v. *Jackson* (1794), 4 Bro. C. C. 514; 6 Ves. 334, n.

Bill of sale (of ship).

On the sale of a ship by bill of sale, a representation in a prior document, which was void as a conveyance for not reciting the ship's registry and was not an agreement for sale for it did not state the price, was not allowed to be treated as forming part of the contract, for "wherever the contract is reduced into writing nothing that is not found expressed in it can be treated as forming part of it:" per Abbott, C.J., *Kain* v. *Old* (1824), 4 Dow. & R. 52 at p. 61; 2 B. & C. 627 at p. 634.

Apparent exceptions.

There is an apparent exception to the rule that no extrinsic evidence is admissible to add to, contradict, vary, or alter the terms of a deed, for such evidence is admissible to alter the

Date and consideration.

statement of the date, and to add to or alter the statement of the consideration, contained in the deed, but this exception is only an apparent and not a real exception, as neither of these matters in fact forms part of the terms of the deed. The date of a deed is the date of its delivery, and the statement of the consideration forms no part of the terms of the deed, but is only a statement contained in the deed of an antecedent fact.

Whole contract not in the deed.

There is also an apparent exception to the rule that no extrinsic evidence is admissible to add to the terms of a deed, for in cases where the whole of the contract between the parties is not expressed in the deed, such evidence is admissible to prove that part of the contract which is not expressed in the deed. Such cases may be divided into three classes: (i.) where the deed is one of a series; (ii.) where there is a collateral agreement; and (iii.) where additional terms are implied from custom or usage. This exception, which is of greater importance than that just mentioned, is, however, also an apparent and not a real exception, for the evidence is not admitted to add to the terms of the contract expressed in the deed, but to show that there existed, besides the contract the terms whereof are expressed in the deed, a further or additional contract the terms whereof do not purport to be expressed in the deed, but which is not inconsistent with that, the terms of which are so expressed.

Series of deeds.

Evidence is admissible to show that a deed is only one of a series of deeds, which together contain the terms of the contract between the parties.

Defeasance.

A common example of this is the case of a conveyance absolute in form, which appears by a separate defeasance, to be made only for the purpose of securing money: *Manlove* v. *Bale* (1688), 2 Vern. 84; 1 Eq. Ca. Abr. 313, pl. 15; *Francklyn* v. *Fern* (1740), Barnard, Ch. Rep. 30.

Indorsements.

Indorsements have in many cases been held to be parts of the deeds: *Broke* v. *Smith* (1603), Moore, 679; *Thompson* v. *Butcher* (1627), 3 Buls. 300; S. C. *sub nom. Tomson* v. *Butcher*, Bendl. 154; *Burgh* v. *Preston* (1800), 8 T. R. 483; *Lyburn* v. *Warrington* (1816), 1 Stark. 162; *Eales* v. *Conn* (1830), 4 Sim. 65; and in the absence of evidence to the contrary an indorsement on, or any other apparent alteration in, a deed is assumed to have been made before execution.

A note given by the husband to the wife at the time of executing a marriage settlement, which in effect made him trustee for her of

a life estate taken under the settlement, was treated as part of the settlement: *Tyrrell* v. *Hope* (1743), 2 Atk. 558.

Evidence admissible whether deeds refer to same transaction.

Evidence of the surrounding circumstances is admissible to show whether deeds, not referring to each other, are parts of the same transaction, or are separate transactions: *Lord Cromwel's Case* (1601), 2 Rep. 69 b; *Harman* v. *Richards* (1852), 10 Hare, 81; *Thompson* v. *Webster* (1859), 4 De G. & J. 600.

Subsidiary agreement.

If a document is not the real agreement but only a subsidiary document for carrying out one of the terms of the agreement, it may be proved that such is the fact. "The written document signed by the plaintiffs and purporting to be a transfer was not (as in *Lord Irnham* v. *Child* (1781), 1 Bro. C. C. 92; *Martin* v. *Pycroft* (1852), 2 D. M. & G. 785, and other cases of that class) a contract valid and operative between the parties but omitting, designedly or otherwise, some particular term which had been verbally agreed upon, but was a mere piece of machinery obtained . . . as subsidiary to and for the purposes of the verbal and only real agreement under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent:" per Lord Selborne, L.C., *Jervis* v. *Berridge* (1873), L. R. 8 Ch. 351 at p. 359.

Collateral agreements.

> Evidence is admissible of any collateral agreement as to any matter on which the deed is silent, and not inconsistent with the terms of the deed, and whether constituting a condition precedent to the attaching of any obligations under the deed or not.

"No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement, but nevertheless what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself:" per Mellish, L.J., *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756 at p. 766.

"Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy and it in no way affected the terms of the tenancy during the three years, which was

all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed:" per A. L. Smith, M.R., *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215 at p. 222.

Leases.

Thus evidence was admitted of a collateral agreement, by a landlord to keep down rabbits: *Morgan* v. *Griffith* (1871), L. R. 6 Ex. 70; *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756; to put a house into repair: *Angell* v. *Duke* (1875), L. R. 10 Q. B. 174; that an additional rent should be paid if rebuilding cost more than a specified sum: *Williams* v. *Jones* (1888), 36 W. R. 573; that the drains of a house were in good order: *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; and that a bill of sale should not be made available until the grantee had exhausted certain other securities for the advance: *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547, see per Kay, L.J., at p. 555.

Bill of Sale.

Where there was an agreement whereby A. was to sell and B. was to purchase certain furniture, and whereby A. authorised B. to settle an action brought against A. on a bill of exchange, and agreed to give up the tenancy of certain premises held of B., evidence was admitted of a collateral agreement by B. to find the necessary money and to pay the bill on which A. was being sued: *Lindley* v. *Lacey* (1864), 17 C. B. N. S. 578; 34 L. J. C. P. 7.

Assumed basis of contract.

To the same principle may be referred the case of *Krell* v. *Henry*, [1903] 2 K. B. 740, in which it was held (extending the doctrine of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, viz., that, where from the nature of the contract it appears that the parties must have contracted on the basis of the continued existence of some specific thing, they are excused from the performance of the contract by the destruction of such specific thing without the contractor's default) that evidence may be given of "a condition or state of things appearing to have been assumed by the parties to be the foundation or basis of the contract."

Terms implied by custom.

Evidence is admissible of any custom or usage by which terms, not expressly mentioned in, but which are not inconsistent with, or repugnant to, the terms mentioned in the deed, are annexed to contracts of the description contained in the deed.

Implied additional terms.

This rule having reference to *implied* additional terms, must be carefully distinguished from one with which it is often confounded, the rule, namely, that extrinsic evidence may be used to show the

meaning that the usage of the business to which the contract relates has affixed to words or phrases employed in setting forth the *expressed* terms of the contract, which latter rule has been discussed *suprà*, Chapter on Words to be construed in literal meaning.

The distinction is obvious: the rule under consideration introduces additional and unexpressed stipulations into the contract contained in the deed, while the rule referred to deals with the manner in which the meaning of the expressed terms of that contract is to be ascertained.

Custom and usage.

"It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed:" per Parke, B., *Hutton* v. *Warren* (1836), 1 M. & W. 466 at p. 475.

Custom of trade.

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable:" per Parke, B., *Gibson* v. *Small* (1853), 4 H. L. C. 353 at p. 397.

"In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood

Implied, must not be repugnant to expressed, terms.

and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less:" per Coleridge, J., *Brown* v. *Byrne* (1854), 3 El. & B. 703 at p. 715.

"In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and be different contracts. To take a familiar instance by way of illustration: on the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but, by the custom, he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible, is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception therefore, of repugnancy, the incident must be such as, *if expressed in the written contract*, would make it insensible or inconsistent. Thus, to warrant bacon to be 'prime singed,' adding 'that is to say, slightly tainted,' *Yates* v. *Pym* ((1816), 6 Taunt. 446), or to insure all the boats of a ship and add, 'that is to say, all not slung in the quarter,' *Blackett* v. *Royal Exchange Assurance Co.* ((1832), 2 C. & J. 244), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also:" per Lord Campbell, C.J., *Humfrey* v. *Dale* (1857), 7 El. & Bl. 266 at p. 274.

Principle on which evidence admitted.

The following are cases on leases :— Examples.

Where the lease contained no stipulation as to the subject-matter of the custom, evidence of custom was admitted, in *Wigglesworth* v. *Dallison* (1779), 1 Doug. 201 ; 1 Sm. L. C. (11th ed.), p. 545 ; and *Holding* v. *Pigott* (1831), 7 Bing. 465, as to the right of the tenant to enter and take way-going crops ; in *Beavan* v. *Delahay* (1788), 1 H. Bl. 5, as to his right to leave the way-going crop in a barn on the farm for a certain time after the expiration of the lease ; in *Senior* v. *Armitage* (1816) Holt, N. P. C. 197, as to the duty of the tenant to provide work and materials in his away-going year, and for the landlord to make him a reasonable compensation for the same. Where the stipulation in the lease, though applying to the same subject-matter as the custom, was not inconsistent with it, evidence was admitted in *Hutton* v. *Warren* (1836), 1 M. & W. 466, as to mutual rights of both landlord and tenant in respect of the valuations at the termination of the lease. Leases.

On the other hand, the custom was excluded as being inconsistent with the lease, in *Boraston* v. *Green* (1812), 16 East, 71, where the custom was that the outgoing tenant should take to his own use only two-thirds of the way-going crop, and the lease provided that he might take the whole of it, so that it did not exceed twenty-nine acres ; in *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, where by the custom an outgoing tenant was entitled to an allowance for foldage from the incoming tenant, but the lease contained a list of payments to be made by the incoming to the outgoing tenant, which did not comprise an allowance for foldage ; in *Roberts* v. *Barker* (1833), 1 Cr. & M. 808, where the custom was that the outgoing tenant should leave the manure for the landlord and should be paid for the same, but the lease contained a stipulation that he would leave it for the landlord, and contained no provision as to payment ; and in *Clarke* v. *Roystone* (1845), 13 M. & W. 752, where the demise was merely an agreement in writing for a yearly tenancy. Custom excluded.

If the custom is proved it must be taken to apply, unless the terms of the written contract exclude it : *Wilkins* v. *Wood* (1848), 17 L. J. Q. B. 319.

The following are cases on mercantile contracts, and although most of them relate to documents not under seal, they are inserted as illustrating the general principle. Mercantile contracts.

Where policies of marine insurance were in the ordinary form, it was held that a deviation to the river Elbe on a voyage from Bremen to London, though in fact out of the way, was no deviation, for at Policies of marine insurance.

the date of the voyage there was no convoy for ships directly from Bremen to London: *Bond* v. *Gonsales* (1704), 2 Salk. 445; Holt, 469; that a departure from the Downs without convoy to the place of rendezvous for the convoy at Spithead was no breach of warranty to depart with convoy: *Gordon* v. *Morley* and *Campbell* v. *Bordieu* (1746), 2 Stra. 1264; that sails taken out of a ship and warehoused while the ship was being cleaned, *Pelly* v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341, 350, and that goods remaining on board the ship for a long time after arrival, *Noble* v. *Kennoway* (1780), 2 Doug. 510, are covered by the policy; that goods in public lighters are not, but in the consignee's own lighters are, safely landed: *Rucker* v. *London Assurance Co.* (1784), 2 Bos. & Pul. 432, n.; that the provisions of the crew discharged on to an island in the Canton river for the purpose of re-fitting the ship were covered by the policy: *Brough* v. *Whitmore* (1791), 4 T. R. 206; that goods stowed on deck and jettisoned are not covered by the policy: *Miller* v. *Tetherington* (1862), 7 H. & N. 954; affirming 6 H. & N. 278.

Custom excluded.

On the other hand, evidence was not admitted to prove a custom that underwriters never pay for the loss of boats outside the ship, slung upon the quarter, on the ground that such evidence would have contradicted the written contract: *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244; or to prove a custom that underwriters in London insuring money advanced on freight are not bound to make good a general average, where the contract was that they should pay general average: *Hall* v. *Janson* (1855), 4 El. & Bl. 500.

Charter-parties.

Where the engagement was to pay at so much per ton for goods shipped at Bombay, cotton to be calculated at fifty cubic feet per ton, evidence was admitted of a custom to pay according to the measurement taken at Bombay before the goods are loaded: *Bottomley* v. *Forbes* (1838), 5 Bing. N. C. 121. Where the defendant agreed to load a full and complete cargo of sugar at Trinidad, evidence was admitted to prove a custom at Trinidad that the sugar was to be loaded in hogsheads, and not otherwise: *Cuthbert* v. *Cumming* (1855), 10 Ex. 809; 11 Ex. 405. Evidence was admitted to show that, by usage of trade, agents signing a charter-party for undisclosed principals are personally liable, if the principals are not disclosed within a reasonable time: *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482.

Custom excluded.

On the other hand where the vessel was to deliver at H., "or as near thereto as she could safely get," "to discharge as customary," and she could not safely get to H., evidence of a custom

of the port of H., that the merchant was not bound to accept delivery otherwise than at H., was rejected as being inconsistent with the written contract: *Hayton* v. *Irwin* (1879), 5 C. P. D. 130.

So in the case of *The Alhambra* (1881), 6 P. D. 68, the Court of Appeal held that a custom for vessels to be lightened in Lowestoft roads was inconsistent with the terms of the charter-party, and therefore not admissible to aid the construction of the charter-party.

And where the ship was "to be consigned to the charterer's agents in China free of commission on this charter," and the custom was alleged that whenever a ship, chartered in London for China, is agreed to be consigned to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of the agents as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from the port; and that they are entitled to be paid the usual brokers' commission on the amount of the freight payable under such charter, unless excluded by special contract; but that in case the owners of a ship procure a charter or cargo for a voyage from the port without any default of the consignees, the latter are entitled to the broker's commission on any freight payable under any such charter-party, unless such right is excluded by special contract. It was held on demurrer that the custom could not be imported into the contract, as it added a new term to it, and did not only explain particular expressions: *Phillipps* v. *Briard* (1856), 1 H. & N. 21.

Bought and sold notes.

Evidence was admitted of a custom that sale should be by sample: *Syers* v. *Jonas* (1848), 2 Ex. 111; *O'Neill* v. *Bell* (1866), Ir. R. 2 C. L. 68.

Sale of "fifty tons best oil expected to arrive per the *Chalco*, at 40*l.* per ton; wet, dirty, and inferior oil, if any, at a fair allowance." The oil arrived containing only one-fifth of "best oil." *Held*, that usage might be proved that such a contract was satisfied if the oil delivered contained a substantial portion of best oil: *Lucas* v. *Bristow* (1858), El. B. & El. 907.

Sale of barley, to be about as per sample. *Held*, that a custom of the London Corn Exchange that the buyer was not entitled to reject for difference in quality unless the same was excessive or unreasonable was a good custom: *In re Arbitration between Walker and Others and Shaw, Son & Co.*, [1904] 2 K. B. 152.

Evidence of usage of trade was admitted to show that where a broker purchased without disclosing the name of his principal, he was liable to be looked upon as the purchaser: *Humfrey* v. *Dale* (1857), 7 El. & Bl. 266; S. C. affirmed on appeal *sub nom.*

Dale v. *Humfrey* (1858), El. Bl. & El. 1004; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126; and *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195. See also Pollock on Cont. (7th ed.), pp. 111 *et seq.;* Smith's Merc. Law (10th ed.), Bk. I. c. 4, p. 173.

Custom excluded.

But evidence was not admitted of the following alleged customs, viz.: to insert the names of vendors' brokers in the contract when the principals were indebted to them, for the purpose only of securing that the purchase-money should pass through their hands: *Jones* v. *Littledale* (1837), 6 Ad. & El. 486; to accept bacon slightly tainted as "prime singed" bacon: *Yates* v. *Pym* (1816), 6 Taunt. 446; to reject undisclosed principal, and look to broker for fulfilment of contract: *Trueman* v. *Loder* (1840), 11 Ad. & El. 589 (on which see 2 Sm. L. C. 408 (11th ed.), notes to *Thomson* v. *Davenport*, and Lord Campbell's judgment in *Humfrey* v. *Dale*, 7 El. & Bl. 266, at p. 277); to give credit: *Ford* v. *Yates* (1841), 2 M. & Gr. 549; that vendors were entitled to retain goods till payment: *Spartali* v. *Benecke* (1850), 10 C. B. 212 (but see *Field* v. *Lelean* (1861), 30 L. J. Ex. 168; 6 H. & N. 617); the terms of the bought and sold note being in each case repugnant to the custom.

And the usage that where a broker purchases without disclosing the name of his principal he is liable to be looked upon as the purchaser, is inconsistent with a clause that in case of dispute the matter is to be referred to the arbitration of the broker, and evidence of such usage was therefore rejected: *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635.

Bill of lading.

Where the master of a ship agreed to take out to certain places "a boat" of specified dimensions, he was allowed to prove a usage to take the deck off such a boat when stowed on board ship: *Haynes* v. *Holliday* (1831), 7 Bing. 587.

Freight to be "five-eighths of a penny sterling per pound, with five per cent. primage, and average accustomed." Evidence admitted to prove that, according to usage, three months' interest is deducted from the freight on goods coming from certain ports: *Brown* v. *Byrne* (1854), 3 El. & Bl. 703.

Miscellaneous.

An architect, employed by the defendants to draw specifications of the plan of a new workhouse, employed the plaintiff to make out the quantities; the defendants refused to allow the building to proceed. *Held,* in an action by the plaintiff for his remuneration, that he might prove a usage in the trade for architects to have the quantities taken out by surveyors: *Moon* v. *Whitney Union* (1837), 3 Bing. N. C. 814.

Written contract that plaintiff should perform at defendant's theatre, and that defendant should engage her for *three years*, and pay a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively: evidence was admitted to show that, according to the usage of the profession, the plaintiff was only to be paid during the theatrical season in each year: *Grant* v. *Maddox* (1846), 15 M. & W. 737.

It has been held by Cotton, Brett, and Bramwell, L.JJ., that where goods are ordered of a manufacturer of such goods, evidence is admissible of a usage in the particular trade that the goods delivered shall be of the manufacturer's own make, and by Cotton and Brett, L.JJ. (Bramwell, L.J., *dissentiente*), that in the absence of an express term to the contrary it is an implied term in such a contract that the goods shall be of the manufacturer's own make, but that evidence of a usage to the contrary in the particular trade is admissible: *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438.

Where one of parties is ignorant of usage.

The rule does not apply where one of the parties is ignorant of the usage; at all events, where it is not the usage of the whole trade, but merely of some of the persons engaged in the trade. Thus, where it was found by the jury that a certain usage as to policies prevailed amongst the underwriters frequenting Lloyd's, and merchants effecting policies there, and the plaintiff effected a policy there, but it was not found that he was in the habit of frequenting the place, it was held that he was not bound by the usage: *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388; but in *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654, a new trial was ordered on the ground that evidence of a usage of the port of Liverpool had been improperly rejected as inapplicable to the interpretation of a contract between a foreign shipowner and a Liverpool merchant.

The whole question of admitting evidence of custom or usage is further discussed in the notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. (11th ed.), p. 545; Leake on Contracts (4th ed.), pt. i. c. 4, s. 2, pp. 127—134; pt. ii. c. 2, s. 3, pp. 350, 351; Chitty on Contracts (14th ed.), c. 5, s. 12, pp. 110 *et seq.*; Woodfall, Landl. & Tent. (17th ed.), c. 5, s. 4, p. 155; s. 9, p. 198; c. 20, ss. 4, 5, pp. 812—829; Smith, Landl. & Tent. (3rd ed.), p. 307; Steph. Dig. Ev. Art. 90; Taylor on Evidence (9th ed.), ss. 1168 *et seq.*

Extrinsic evidence admissible to show that deed is not binding.

Extrinsic evidence is admissible for the purpose of showing that the deed is not binding on the parties either on the ground of infancy, coverture, lunacy, fraud,

mistake, accident, or duress, or on the ground of its having been made for some unlawful consideration, such as to compound a felony, or as *premium pudicitiae*, or of its having been delivered as an escrow, subject to the performance of a condition which has not been fulfilled.

Of course this proposition is no exception to the rule that extrinsic evidence is not admissible for the purpose of adding to, contradicting, varying, or altering the terms of the deed, as the evidence is adduced not for the purpose of interpreting the deed, but for the purpose of showing that the deed ought not to be interpreted: *Pym* v. *Campbell* (1856), 6 E. & B. 370; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

"No doubt there is an equity under some circumstances to set aside a deed. There is an equity to rectify a deed. But it must be judicially set aside or rectified, and unless and until that is done it is a violation of first principles to allow evidence as to the meaning and intention of parties when there is an actual agreement in writing, the record of that meaning and intention:" per James, L.J., *Ex parte Morgan* (1875), 2 Ch. D. 72 at p. 84; and see *Collins* v. *Blantern* (1766), 2 Wils. 341; 1 Sm. L. C. 369.

Subsequent admissions or conduct inadmissible to construe deed.

The subsequent admission as to the true meaning of a deed by, or subsequent conduct of, a party to, or person claiming under, a deed, cannot be received to aid the construction of the deed.

Settlement.

Voluntary settlement not controlled by subsequent letter of settlor: *Clavell* v. *Littleton* (1710), Pre. Ch. 305.

Subsequent will of one of the parties not admitted to aid construction of settlement: *Doran* v. *Ross* (1789), 1 Ves. Jr. 57 at p. 58.

Leases.

A covenant of renewal contained in a lease held to be satisfied by a lease without a further covenant for renewal, notwithstanding that leases with such a covenant had been continuously made by the parties: *Iggulden* v. *May* (1804), 9 Ves. 325; (1806), 7 East, 237, and on appeal (1807) 2 Bos. & P. N. R. 449.

Conveyance.

Where a deed purported to convey a messuage in the occupation of A. *with the appurtenances*, and it was proved that A. was in the occupation of a small adjoining garden, it was held that, the

garden having passed as appurtenant to the messuage, the declarations of the grantee that he had not purchased the garden, were inadmissible to contradict the deed: *Doe* d. *Norton* v. *Webster* (1840), 12 A. & E. 442; 4 P. & D. 270.

Mining leases.

Where a lease of a coal mine contained a covenant by the lessee to pay to the lessor a certain share of all sums of money for which the coal should sell at the pit's mouth, evidence that the lessee had accounted for and paid to the lessor the same share of money produced by the sale of coals elsewhere, was not allowed to be given in explanation of the covenant: *Clifton* v. *Walmesley* (1794), 5 T. R. 564; *Simpson* v. *Margitson* (1847), 11 Q. B. 23; *N. E. Ry. Co.* v. *Hastings*, [1900] A. C. 260.

Ancient documents.

This rule does not apply to ancient documents, the admissibility of evidence in regard to which is discussed in the next chapter.

CHAPTER IX.

ANCIENT DOCUMENTS.

Contemporaneous Interpretation: Usage: What Usage Means: Modern Usage: Clear Words not Controlled by Usage: What is an Ancient Document.

Difficulty produced by lapse of time in obtaining evidence of meaning of words.

THE longer the period that elapses between the time of executing and the time of interpreting a document, the greater is the difficulty in obtaining direct evidence as to the meaning of the words employed; and if the document is very ancient, the difficulty becomes insuperable. When this is the case, the meaning of the words can sometimes be arrived at with a fair degree of certainty by ascertaining what was the interpretation placed on the document immediately after its execution. The probability is great that at that time there were some persons whose interest it was to insist upon the document being properly interpreted, and the fact that a particular interpretation was then placed on it affords a great probability of the correctness of such particular interpretation; and this probability is increased if it is found that during a long course of years such interpretation has been acquiesced in.

Contemporaneous interpretation.

Evidence is admissible as to the interpretation placed upon an ancient document by persons who lived at, or at a time not remote from, the time of the execution of the document.

The interpretation placed upon a document by persons who lived at the time of its execution is usually called "contemporaneous" interpretation, and sometimes (though incorrectly, because usage implies duration), "the interpretation placed upon it by contemporaneous usage."

Contemporaneous usage.

"*Contemporanea expositio est fortissima in lege:*" Coke, 2nd Inst. 136.

"In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemporanea*

expositio is the best way to go by:" per Lord Hardwicke, C., *Attorney-General* v. *Parker* (1747), 3 Atk. 576 at p. 577.

In admitting evidence of the acts of the owners of allotments under an Inclosure Act to explain an ambiguous award, it was said: "If the road was improperly set out at first, there were persons enough interested in contesting it, who would not have acquiesced so long:" per Curiam, *Wadley* v. *Bayliss* (1814), 5 Taunt. 752 at p. 753.

"If it is shown as it seems to be here that the donor permitted without objection a certain usage with regard to the surplus funds for a number of years, that is rather strong proof of what was intended:" per Lord Brougham, L.C., *Attorney-General* v. *Brazenose College* (1834), 2 Cl. & F. 295 at p. 317.

Evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed" was held by Tindal, C.J., to be admissible to construe the deed: *Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at p. 569.

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means:" per Sugden, C., *Attorney-General* v. *Drummond* (1842), 1 Dr. & War. 353 at p. 368.

"Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words and expressions:" per Lord Cottenham, *Drummond* v. *Attorney-General* (1849), 2 H. L. C. 837 at p. 861.

"In construing such an instrument" (viz., an ancient instrument), "you may look to the usage to see in what sense the words were used at that time:" per Lord Campbell, *Ibid.* at p. 863.

Ambiguity in word "usage."

It will be observed that there is an ambiguity in the word "usage" as employed in these judgments; it may mean either usage under the instrument, or the ordinary usage of society, which at the date of the deed affixed to the words in it a meaning different from that which they now bear; but a comparison of the judgments with those of Sugden, C., in the same case, *ubi supra*, will show that the word was used in the former meaning, of usage under the instrument.

Contemporanea expositio applied to statutes.

It is perhaps worth noticing that the rule of *contemporanea expositio* is often applied to the interpretation of statutes: *Sheppard* v. *Gosnold* (1671), Vaugh. 159 at p. 169; *R.* v. *Scot* (1790), 3 T. R. 602; *Corporation of Newcastle* v. *Attorney-General* (1845), 12 Cl. & F. 402 at p. 419; *Reg.* v. *Archbishop of Canterbury* (1848), 11

Q. B. 483 at p. 581; *Montrose Peerage Case* (1853), 1 Macq. H. L. 401. But, following the ordinary rule, the Courts are not influenced in the interpretation of a statute by anything that occurred in Parliament during the passing of the statute: *Gorham* v. *Bishop of Exeter* (1850), 5 Ex. 630 at p. 667; *Barbat* v. *Allen* (1852), 7 Ex. 609 at p. 616; *Richards* v. *McBride* (1881), 8 Q. B. D. 119, 123.

Debates in Parliament.

Evidence of usage.

Evidence of the usage under an ancient document is admissible to explain any obscurity or ambiguity, but not to contradict its clear and unambiguous terms.

Usage explained.

By *usage* is meant the acts habitually done with reference to some particular matter during a long period; and when such acts have been done by persons purporting to act under a document, they afford the best possible evidence as to the interpretation which those persons placed upon it. Occasional deviations from the regular course will not negative the existence of a consistent usage, for "it follows almost necessarily from the imperfection and irregularity of human nature that a uniform course is not preserved during a long period. A little advance is made at one time, a retreat at another; something is added, or taken away, from indiscretion or ignorance or through other causes; and when by the lapse of years the evidence is lost which would explain these" irregularities, it must not be too hastily assumed that the received construction is therefore incorrect: *Regina* v. *Archdall* (1838), 8 Ad. & El. 281 at p. 288.

"Ancient charters, whether they be before time of memory, or after, ought to be construed as the law was taken when the charter was made, and according to ancient allowance. . . . And when any claimed before the Justices in Eyre any franchises by an ancient charter, though it had express words for the franchises claimed; or if the words were general, and a continual possession pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading, expounding them to the Court, and averring continual possession according to that exposition; the entry was ever *Inquiratur super possessionem et usum*, &c., which I have observed in divers records of those Eyres, agreeable to that old rule, *Optimus interpres rerum usus*:" Coke, 2nd Inst. 282; and see *Abbot of Strata Mercella's Case* (1591), 9 Rep. 23 b at pp. 27 b, 28 a.

Clear words not overturned by usage.

"Suppose the words of the charter are doubtful, the usage in this case is of great force; not that usage can overturn the clear words

of a charter: but if they are doubtful, the usage under the charter will tend to explain the meaning of them; especially in a case like this, where, before the charter, the corporation consisted of an indefinite number of burgesses by prescription, and where the charter itself added no new members, but only incorporated the old ones:" per Lord Mansfield, C.J., *Rex* v. *Varlo* (1775), 1 Cowp. 248 at p. 250.

"However general the words of the ancient deeds may be they are to be construed by evidence of the manner in which the thing has always been possessed and used:" per Ellenborough, C.J., *Weld* v. *Hornby* (1806), 7 East, 195 at p. 199.

Clear words not overruled.

"In the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage: but, it is equally clear, that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed: and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant:" per Dallas, C.J., *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403 at p. 406; 5 Moore, 185 at p. 192.

"There can be no doubt that to ascertain the meaning of an ancient grant describing lands as 'the territory of Clandeboy,' parol evidence of acts of ownership is admissible, as showing what that territory included:" per Walsh, M.R., *Re Belfast Dock Act* (1867), Ir. Rep. 1 Eq. 128 at p. 141.

Even evidence of modern usage is admissible.

Modern usage.

"I have no doubt that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage:" per Parke, B., *Beaufort* (*Duke of*) v. *Swansea* (*Mayor of*) (1849), 3 Ex. 413 at p. 425; followed by Malins, V.-C., *Corporation of Hastings* v. *Ivall* (1874), L. R. 19 Eq. 558.

"As with respect to ancient deeds the state of the subject at their date can seldom if ever be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period and so to prove contemporaneous usage and enjoyment at the date of the deed:" per Lord Wensleydale, *Waterpark* v. *Fennell* (1859), 7 H. L. C. 650 at p. 684.

"Wherever an old deed is ambiguous in its terms, modern user

affords material aid in the elucidation of its meaning:" per Willes, J., *Simpson* v. *Dendy* (1860), 8 C. B. N. S. 433 at p. 473.

"It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old or obsolete, or even imperfect expressions to be found in ancient documents:" per Bacon, V.-C., *Earl de la Warr* v. *Miles* (1880), 17 Ch. D. 535 at p. 573.

"Usage continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may no doubt justify the presumption of a similar usage as of right from time immemorial:" per Lord Selborne, C., *Neill* v. *Devonshire* (*Duke of*) (1882), 8 A. C. 135 at p. 156.

Rule not applicable where deed is clear.

The rule does not apply where the construction of the deed is clear.

The quotations from the judgments of Lord Mansfield, C.J., *Rex* v. *Varlo* (1775), 1 Cowp. 248 at p. 250, and of Dallas, C.J., in *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403 at p. 406; 5 Moore 185 at p. 192, *suprà*, are authorities for this proposition.

"If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it:" per Cranworth, C., *Sadlier* v. *Biggs* (1853), 4 H. L. C. 435 at p. 458.

"If the words of an ancient grant are ambiguous and leave it in doubt whether a particular place is or is not included in it, evidence of acts of ownership is plainly receivable to show to what the grant extends. On the other hand, if the grant on its true construction excludes the place in question, it is equally plain that proof of such acts is not receivable, for in that case to admit them would be to vary the written document by parol evidence:" per Walsh, M.R., *Re Belfast Dock Act* (1866), Ir. R. 1 Eq. 128 at p. 139.

"The necessity" for introducing evidence of usage "must be apparent—the ambiguity must be found to be existing:" per Bacon, V.-C., *Earl de la Warr* v. *Miles* (1880), 17 Ch. D. 535 at p. 573.

Express words not to be contradicted.

There can only be placed on the words of the document a meaning that they properly bear, there cannot be placed on the words a meaning that they cannot bear, and there cannot be put on the document such an interpretation as will contradict its express

words: *Withnell* v. *Gartham* (1795), 6 T. R. 388 at p. 398; *King* v. *Salway* (1829), 9 B. & C. 424; *Attorney-General* v. *Fishmongers' Co.* (*Preston's Will*) (1841), 5 My. & Cr. 16; *Attorney-General* v. *Ewelme Hospital* (1853), 17 Beav. 366; *Attorney-General* v. *St. Cross Hospital* (1853), 17 Beav. 435; *Attorney-General* v. *Clapham* (1855), 4 De G. M. & G. 591; *Simpson* v. *Dendy* (1860), 8 C. B. N. S. 433; *Attorney-General* v. *St. John's Hospital* (1865), 2 De G. J. & S. 621; *Earl de la Warr* v. *Miles* (1881), 17 Ch. D. 535 at p. 573; *Neill* v. *Devonshire* (*Duke of*) (1882), 8 A. C. 135 at p. 156. Cf. *Re Campden Charities* (1881), 18 Ch. D. 310.

The following are examples of cases where evidence of usage has been admitted:— Examples where usage admitted.

Ancient admissions to copyholds by the description of "*tres acras prati*," followed by modern admissions to "*three acres of meadow*," held on evidence of long usage to pass the *prima tonsura* or fore-crop only: *Stammers* v. *Dixon* (1806), 7 East, 200. *Pratum.*

An ancient grant, of wreck was held on evidence of long usage to have passed the exclusive right to the soil of a small bay: *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403; 5 Moore, 185; of manor and wreck to have passed the sea-shore between high and low-water mark: *Calmady* v. *Rowe* (1844), 6 C. B. 861; of the Priory of H., and also four islands to the said priory belonging, to wit, the island called S., containing three acres, &c., with large general words granting wreck of the sea, flotsam, jetsam, &c., to have passed the sea-shore between high and low-water mark: *Healy* v. *Thorne* (1870), Ir. R. 4 C. L. 495; see also *Hamilton* v. *Attorney-General* (1880), 5 L. R. Ir. 555, another case on the same charter, and *Brew* v. *Haren* (1874), Ir. R. 9 C. L. 29; (1877) Ir. R. 11 C. L. 198. Wreck.

Evidence of user admitted to show that the soil passed by a surrender of "*pasturam bosci et subbosci de Haydwood:*" *Doe* d. *Kinglake* v. *Beviss* (1849), 7 C. B. 456; 18 L. J. C. P. 128. *Pastura.*

Ancient grants of manors held, on evidence of usage which was of so long standing that it might be presumed to be contemporaneous with the grant itself, to include the sea-shore between high and low-water mark: *Beaufort* (*Duke of*) v. *Swansea* (*Mayor, &c., of*) (1849), 3 Ex. 413; *Attorney-General* v. *Jones* (1863), 2 H. & C. 347; 33 L. J. Ex. 249; Stuart Moore on the History and Law of the Shore and Foreshore, p. 681. Manor.

The mountain of S., containing 1,700 acres, held by evidence of usage to have passed by an old demise of "the village of S. and part of W. and T. containing by estimation 148 acres:" *Waterpark* Village.

v. *Fennell* (1859), 7 H. L. C. 650; and see Brown on Usages and Customs, pp. 32 *et seq.*

Right of election.

A power of nominating a schoolmaster, given to "the vicar and his successors and the churchwardens for the time being," held on evidence of usage to be well exercised by the vicar and a majority of the churchwardens: *Withnell* v. *Gartham* (1795), 6 T. R. 388. A further case on the right of election is *Regina* v. *Dulwich College* (1851), 17 Q. B. 600.

Grammar school.

"When a school is instituted as a free grammar-school without more, it is a school to teach the elements of the learned languages: yet . . . if there was an ancient free grammar-school, and if at all times something more had been taught in it than merely the elements of the learned languages, that usage might ingraft upon the institution a right to have a construction put upon the endowment different from what would have been put upon it if a different usage had obtained:" per Lord Eldon, C., *Attorney-General* v. *Hartley* (1820), 2 J. & W. 353 at pp. 378, 379.

Charitable trusts.

Further cases to the same effect are: *Attorney-General* v. *Mayor of Bristol* (1820), 2 J. & W. 294 at p. 321; *Attorney-General* v. *Brazenose College* (1834), 2 Cl. & F. 295; *Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at p. 568; *Attorney-General* v. *Corporation of Boston* (1847), 1 De Gex & Sm. 519; *Attorney-General* v. *Murdoch* (1851), 1 De G. M. & G. 86; and *In re Campden Charities* (1881), 18 Ch. D. 310; and the point is discussed in Lewin on Trusts (11th ed.), c. xxi. s. 18, p. 619; Tudor on Charitable Trusts (3rd ed.), c. v. pp. 113 *et seq.*

Interpretation by usage is recognised in the case of charitable trusts by the Acts 7 & 8 Vict. (1844), c. 45, s. 2, and 23 & 24 Vict. (1860), c. 134, s. 5, which apply respectively to Protestant Dissenters and Roman Catholics.

Charters.

Where the election of a mayor was by charter to be as follows, viz.: "That the mayor, aldermen, and burgesses, or the greater part of them, should from time to time have a power of assembling themselves, or the greater part of them, at —— and should there continue till they or the greater part of them then there assembled should choose one of the aldermen to be mayor." *Held*, on evidence of usage, that an election of a mayor by a majority of the electors assembled was good: *Rex* v. *Varlo* (1775), 1 Cowp. 248.

Where by charter Edward IV. granted to the corporation of the city of London certain offices, some of which were to be exercised within the city, and others within the city and the liberties thereof, including in the former class the office of gauger,

Lord Ellenborough, C.J., held on the evidence of continuous usage and the form of the Lord Mayor's oath that the corporation could exercise the office of gauger not only in the city but also within the liberties thereof: holding that "city" could receive a wider interpretation than "within the walls:" *Mayor, &c. of London* v. *Long* (1807), 1 Camp. 22.

Covenant to renew.

A covenant for renewal in a lease has been held, on evidence of usage, to amount to a covenant for perpetual renewal, in *Cooke* v. *Booth* (1778), 2 Cowp. 819 (see the comments on this case in *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295 at p. 298), and *Sadlier* v. *Biggs* (1853), 4 H. L. C. 435.

Miscellaneous.

A deed of trust of a rectory, which gave the right of election of a curate to the parishioners and inhabitants: *Attorney-General* v. *Parker* (1747), 3 Atk. 576; and an ambiguous inclosure award: *Wadley* v. *Bayliss* (1814), 5 Taunt. 752; and a grant of tithes from the Crown: *Lucton School* v. *Scarlett* (1828), 2 Y. & J. 330, 363, 365; have all been explained by evidence of usage.

In *Gape* v. *Handley* (1777), 3 T. R. 288, *n.*, the question whether the presentation to a rectory belonged to the mayor and aldermen, or to the mayor, aldermen and burgesses; in *Blankley* v. *Winstanley* (1789), 3 T. R. 279, the limits of the jurisdiction of magistrates; and in *Bradley* v. *Pilots of Newcastle-on-Tyne* (1853), 2 El. & Bl. 427, the persons liable to pay *primage*; were determined by evidence of usage. *R.* v. *Bellringer* (1792), 4 T. R. 810; *R.* v. *Osbourne* (1803), 4 East, 327; *Bailiffs, &c. of Tewkesbury* v. *Bricknell* (1809), 2 Taunt. 120; *R.* v. *Mayor of Chester* (1813), 1 M. & S. 101; *R.* v. *Davie* (1837), 6 Ad. & El. 374, are to the same effect, and the point is mentioned in Grant on Corporations, p. 27.

Where some persons have interests adverse to usage.

As already stated, the force of usage as evidence of interpretation is much increased when it has been the interest of some of the parties to dispute the correctness of the established interpretation. "It appears to me," says Lord Cranworth, "that there are the most satisfactory circumstances tending to show what the rights of the parties are: there are, long enjoyment, the same dealing with the property for a very great period, during the whole of which it was for the interest of one party to resist that which, nevertheless, he from time to time performed:" *Sadlier* v. *Biggs* (1853), 4 H. L. C. 435 at p. 455.

Result of contradicting express words.

If evidence of usage were admissible for the purpose of affixing to the words in the document a meaning that they do not properly bear, the absurd result would be arrived at that the interpretation

placed on the same document might vary from time to time, or that a person who acted under a mistake as to his rights by virtue of an instrument would be for ever bound to act in the same manner: *Moore* v. *Foley* (1801), 6 Ves. 232 at p. 238; *Iggulden* v. *May* (1807), 2 Bos. & Pul. N. R. 449; Sugden, V. & P. 169.

Ancient statutes.

Ancient statutes can also be interpreted by usage: *R.* v. *Scot* (1790) 3 T. R. 602; *Dunbar* (*Corporation of*) v. *Roxburghe* (*Duchess of*) (1835), 3 Cl. & F. 335; *Reg.* v. *Archbishop of Canterbury* (1848), 11 Q. B. 483 at p. 581; *Sharpley* v. *Overseers of Mablethorpe* (1854), 3 El. & Bl. 906; *Esdaile* v. *Assessment Committee of City of London Union* (1887), 19 Q. B. D. 431, at p. 437. But if the words of the statute are clear, an interpretation which contradicts them cannot be supported on the ground of usage: *Sheppard* v. *Gosnold* (1671), Vaugh. 159 at p. 170; *Dunbar* (*Corporation of*) v. *Roxburghe* (*Duchess of*) (1835), 3 Cl. & F. 335; *Regina* v. *Archbishop of Canterbury* (1848), 11 Q. B. 483 at p. 581; *Attorney-General* v. *Rochester* (*Corporation of*) (1854), 5 De G. M. & G. 797, per Turner, L.J., at p. 822; *Hamilton* v. *Baker* (1889), 14 Ap. Ca. 209, per Lord Macnaghten, at p. 222.

When a deed is ancient.

The only case in which the question when a deed becomes ancient has been discussed appears to be *North Eastern Ry. Co.* v. *Hastings*, [1900] A. C. 260, a case on a lease dated in 1854; and in that case Lord Davey said: "I have formed my opinion on what is to be found within the four corners of the instrument to be construed without adverting to the fact that the actings of the parties for forty-three years before the commencement of the action have been inconsistent with the views taken by your Lordships. I do not think that I could properly advise your Lordships to hold that the actings of the parties during that period, which does not exceed the limits of living memory, is evidence, upon which you can act without other grounds for doing so, of a lost agreement varying that of 1854, or, which is the same thing in another form, adopt the construction acted on by the parties as '*contemporanea expositio*.' To do so would be inconsistent with what was said by Lord Blackburn and Lord Watson in this House in *Clyde Trustees* v. *Laird* (1883), 8 A. C. 658, speaking in 1883 of an Act passed in 1858, and so far as I know would be unsupported by any authority:" *Ibid.* at pp. 268, 269.

When a statute is ancient.

"I have only to add that, in my opinion, such usage as has in this case been termed '*contemporanea expositio*,' is of no value whatever in construing a British statute of the year 1858. When there are ambiguous expressions in an Act passed one or two

centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested as evidencing what must presumably have been the intention of the Legislature at that remote period. But I feel bound to construe a recent statute according to its own terms when these are brought into controversy and not according to the views which interested parties may have hitherto taken: and in determining the true import of such a statute it appears to me to be quite immaterial to consider whether it was passed in the year 1858 or 1883:" per Lord Watson, *Trustees of Clyde Navigation* v. *Laird* (1883), 8 A. C. 658 at p. 673.

CHAPTER X.

TIME—DATE—PARTIES.

Chronology: Calendar: Feast Days are New Style: Year: Leap Year: Quarter: Per Annum: Month: Day: Day is Indivisible: Except where necessary to distinguish Acts done on same Day: "From" a Day, Day is Excluded: Commencement "on" a Day, Day is Included: "From" an Event, Day on which event happens is Included: "Till" and "Until" are Ambiguous: "To" and "From" with regard to place: Deed takes Effect from Delivery: Evidence admissible to prove Date: Construction of Reference to Date: Parties: Baptismal Names: Reputed Wife: Divorced Woman: Incorrect Names: Firms: Class: Corporation: False Addition.

Having thus far discussed the general rules applicable to the construction of deeds, it is proposed to consider the various clauses in deeds in the order in which they usually occur, and since most deeds commence with the date and parties, those are the first clauses to be discussed.

But before discussing the cases relating to the dates of deeds, it is convenient to consider the question of time generally.

Chronology.

The dating of mediaeval documents is sometimes a source of confusion: there are two main causes of error.

Commencement of era.

First, a discrepancy as to the commencement of the Christian era, which is now reckoned to have begun on January 1st, A.D. 1, but which, according to Dionysius, began on what is now called March 25th, B.C. 1, and according to others, began on what is now called March 25th, A.D. 1.

Secondly, a discrepancy as to the day and month in which the year begins.

Commencement of year.

In England, Christmas Day was regarded as the first day of the year, at any rate from the seventh century until the twelfth century, when March 25th began to supersede Christmas Day, and by the end of the thirteenth century had superseded it, and continued to be the official first day of the year until 1752, when the

first day of the year was changed to January 1st, by the statute 24 Geo. II. (1751), c. 23, which made the year 1751, which began on March 25th, to end on December 31st, and the year 1752 and all subsequent years to begin on January 1st. This statute merely gave official recognition to what had for a long time been the popular practice, and it is probable that many legal documents were before 1752 dated as though the year began on January 1st.

Julian calendar.

The civil calendar of all European countries, and of all countries the civilisation of which is European in its origin, has been adopted from the Roman calendar, which was established on a scientific basis in the dictatorship of Julius Caesar, and is called the "Julian calendar." It came into force on January 1st in the year 45 B.C. It was based on the assumption that the length of the solar year is exactly 365¼ days, and accordingly three out of every four years consisted of 365 days and the fourth year of 366 days, an intercalary day being added in February. But as the length of the year is really somewhat less than 365¼ days, there arose, in course of time, a considerable divergence between the dates upon which such natural events as the equinoxes and solstices occurred, and the dates on which they had occurred when the calendar came into force. Thus the vernal equinox, which had, when the Julian calendar was made, occurred on March 25th, had at the time of the Council of Nice (325 A.D.) retrograded to March 21st, and in 1582 to March 11th.

Gregorian calendar.

In the latter year, under the auspices of Pope Gregory XIII., the calendar was reformed for two purposes. First, in order to restore the nominal dates of the natural events of the year to the dates on which they had occurred at the time of the Council of Nice (*e.g.*, the vernal equinox from March 11th to March 21st), the ten days between October 4th and October 15th were omitted from the calendar for one year; that is to say, the natural day following October 4th was called October 15th, and that year consisted of 355 days only. Secondly, in order to prevent a similar divergence in the future, the number of intercalary days in 400 years was reduced by three by treating a centenary year which, according to the Julian calendar, would have been a bissextile or leap year, as a common year of 365 days, unless its number was exactly divisible by 400. Thus, according to both the Julian and Gregorian calendars, the year 1600 was a bissextile year, but the years 1700, 1800, and 1900, which, according to the Julian calendar would have been bissextile, were, according to the Gregorian calendar, not bissextile.

The Gregorian calendar was promulgated by brief of

Gregory XIII. in March, 1582, and adopted in the same year by many European countries, but was introduced into the British Dominions of George II. by the above-mentioned statute, 24 Geo. II. (1751), c. 23, when the necessary correction in the calendar was made by omitting from the calendar for 1752 the eleven days between September 2nd and September 14th, and the Gregorian arrangement of intercalary days was adopted. Some official anomalies are explainable by reference to the unreformed calendar; thus April 5th, which is the day before Old Lady Day and the last day of the old official year, is still the day to which dividends on Government stocks are calculated.

Introduced into England.

Tables of the dates of the years of the Sovereigns of England, methods of determining the dates of the beginnings and ends of the law terms before 1752, and the dates of the beginnings and ends of the terms from 1752 to 1830 inclusive, are to be found in Sweet's Jarman and Bythewood, vol. 1, pp. 188 *et seq.* (3rd ed.).

Feast days are feast days according to Gregorian calendar, in deeds.

Since the reformation of the calendar, Michaelmas and Martinmas (and on the same principle the other feast days) mean in deeds Michaelmas and Martinmas according to the new style, unless a contrary meaning can be derived from the context, and evidence is not admissible to prove the contrary.

A tenant, after holding for a few years on a parol agreement from Old Michaelmas, took a lease to hold from the feast of St. Michael. After the expiration of the lease he held over. Notice to quit was given for Old Michaelmas, but it was held bad, and no evidence was admissible to show that in the lease the feast of St. Michael meant Old Michaelmas, unless there had been in the lease a reference to the prior holding (which there was not): *Doe* d. *Spicer* v. *Lea* (1809), 11 East, 312.

In a pleading Martinmas means November 11th, and not November 23rd (Old Martinmas), and no extrinsic evidence ought to be received to explain the record: *Smith* v. *Walton* (1832), 8 Bing. 235; 1 Moore & S. 380; 1 L. J. N. S. C. P. 85.

In parol lettings custom admissible.

But if there be a parol letting, evidence of the custom of the country that Michaelmas means Old Michaelmas, or Lady Day, Old Lady Day, is admissible.

In ejectment, the custom of the country that all holdings from Michaelmas meant from Old Michaelmas being admitted, *held* that a notice to quit at Michaelmas must be regarded as notice to quit

at Old Michaelmas, and therefore regular: *Furley* d. *Mayor of Canterbury* v. *Wood* (1794), 1 Esp. 198.

Where there was a letting by parol from Lady Day, it was held that evidence of the custom of the country was admissible that Lady Day meant Old Lady Day: *Doe* d. *Hall* v. *Benson* (1821), 4 B. & Ald. 588.

Meaning of year.

A year usually means a period of twelve calendar months, calculated either from 1st January or from any other named day, and consisting of 365 days in common years and of 366 days in leap years.

"The space of a year is a determinate and well-known period, consisting commonly of 365 days; for though in bissextile or leap years it consists properly of 366, yet by the statute 21 Hen. III. (1236) the increasing day in the leap year, together with the preceding day, shall be accounted for one day only:" Blackst. Com. Bk. II. (3rd ed. p. 140). The statute (which is in Ruffhead's edition 21 Hen. III., and in the Statutes of the Realm 40 Hen. III. (1255)) related to essoins only, and was repealed by 42 & 43 Vict. c. 59 (The Civil Procedure Acts Repeal Act, 1879).

Leap year.

A hiring on 13th October, 1807, to serve till 11th October following, held not a service for a year, although the year 1808 was a leap year. "In those years which consist of 366 days a hiring and service for a year must be for that same number of days: in like manner as when the year has 365 days it must have continuance during that number:" per Lord Ellenborough, C.J. "One day was wanting to complete the year, for in leap year the statute enacts that the year shall consist of 366 days:" per Bayley, J. "The statute for regulating the bissextile year ordains that in leap year the intercalary day with the day preceding it shall be accounted as one day:" per Holroyd, J., *R.* v. *Inhabitants of Worminghall* (1817), 6 M. & S. 350.

Quarter.

Condition for re-entry on non-payment of rent at Michaelmas or by the space of a quarter of a year after. *Held*, that 91 days made a quarter, the law paying no regard to the six hours over, "and note that every quarter of a year contains in it 91 days, which make 13 weeks, and half a year contains 182 days, but the year 365 days:" *Anon.* (1575), 3 Dyer, 345 a, pl. 5.

From feast to feast.

But in some cases a year has been held to mean a period less than 365 days. Thus, a hiring from Whitsuntide to Whitsuntide is a hiring for a year though there be in fact less than 365 days

between the two feasts: *R.* v. *Inhabitants of Newstead* (1769), Burr. S. C. 669.

Yearly offices.

A municipal charter provided that the capital burgesses and common council should nominate and elect on the Monday before Michaelmas a person to be mayor for one whole year thence next ensuing, and that he should take certain oaths before executing the office on the Friday after Michaelmas. None who had once borne the office of mayor should be again elected within the space of three years next ensuing the end of his office of mayoralty. *Held* that three years meant years of office, and not calendar years, and therefore a person who had served as mayor might be promoted to the same office as soon as three mayoralties had intervened; also that a person became mayor when he was sworn in, not when he was elected: *R.* v. *Swyer* (1830), 10 B. & C. 486.

"Per annum."

In cases to which the Apportionment Act does not apply, if a payment of a certain sum is to be made "in each year" or "per annum," the sum is not apportionable, and is only payable in respect of a completed year, but if the payment is "at the rate of so much a year," the sum is apportionable and payable in respect of incomplete years.

Articles of association provided that "the board shall be entitled to receive by way of remuneration in each year 5,000*l.*" *Held* that remuneration could only be claimed for a complete year. "Art. 81 does not give remuneration at the rate of 5,000*l.* a year, but only provides that the board shall be entitled to receive by way of remuneration in each year 5,000*l.*:" per Cozens-Hardy, J., *Salton* v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775 at p. 779.

Articles of association provided that "the directors shall be paid out of the funds of the company . . . a sum of 100*l.* per annum to each director" as remuneration. *Held* that that sum was not apportionable and the directors were not entitled to any remuneration for the seven months preceding the liquidation. "If . . . the words had been at the rate of . . . *l.*, I suppose there can be no question that the sums would be apportionable:" per Wright, J., *In re Central de Kaap Gold Mines* (1899), 69 L. J. Ch. 18.

"In each year."

Where something is to be done in each year, year means a calendar year from 1st January to 31st December.

Section 26 of the Companies Act, 1862, provides that a list of shareholders shall be made "once at least in every year." Section 49, that a general meeting shall be held "once at least in

every year." *Held* that year meant calendar year from 1st January to 31st December, and not a period reckoned from incorporation to the anniversary of incorporation: *Gibson* v. *Barton* (1875), L. R. 10 Q. B. 29.

Meaning of month.

Month, unless the context or other admissible evidence shows the contrary, means lunar month in all documents except (i.) ecclesiastical documents; (ii.) mercantile documents (*quaere* in the city of London only: per Farwell, J., *Bruner* v. *Moore*, [1904] 1 Ch. 305); (iii.) statutes since 1850 (13 & 14 Vict. (1850), c. 21, s. 4; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3); and (iv.) Rules and Orders of Court, &c. (R. S. C. Ord. LXIV., r. 1; County Court Rules, 1903, Ord LV.); and lunar month is a period of twenty-eight days.

"A month, *mensis*, is regularly accounted in law twenty-eight dayes, and not according to the solar month nor according to the kalendar, unlesse it be for the account of the laps in a *quare impedit*:" Co. Litt. 135 b.

The Magna Carta provides that the County Court shall be holden *de mense in mensem*, "and there is to be accounted twenty-eight dayes to the legall month in this case, and not according to the month of the kalender:" Co. 2 Inst. 71, n. 2.

By 27 Hen. VIII. (1535) c. 16, bargains and sales of land were required to be enrolled within six months after the date thereof. "The six moneths shall be accounted after the computation of twenty-eight dayes to the moneth:" Co. 2 Inst. 674, n. 10; *Thomas* v. *Popham* (1562), 2 Dyer, 218 b.

By 31 Eliz. (1588) c. 7, a penalty of 10*s*. was imposed for every month that an offence continued. "This moneth is to be accounted according to the computation of twenty-eight daies:" Co. 2 Inst. 738, n. 4.

"The space of a month is more ambiguous:" (*sc*. than that of a year) "there being in common use two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths according to the Julian division in our common almanacs commencing at the calends of each month whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise

expressed; not only because it is always an uniform period, but because it falls naturally into a quarterly division by weeks. Therefore, a lease for 'twelve months' is only for forty-eight weeks, but if it be for 'a twelvemonth,' in the singular number, it is good for the whole year:" Blackst. Com. Bk. II. (8th ed. p. 141).

"A twelvemonth."

In a contract at law month means a lunar month, unless there is admissible evidence of an intention in the parties using the word to denote a calendar month: Sug. V. & P. (14th ed.) p. 257.

Contracts relating to land.

It may be observed that even in a contract for or connected with the sale of land the term month means *primâ facie* a lunar month, although it may be construed a calendar month if from the context or from the surrounding circumstances at the time of making the contract such appears to have been the intention of the parties: Dart, V. & P. c. 10, s. 1 (7th ed. p. 505); and to the same effect Woodfall, Landlord and Tenant c. 6, s. 2 (17th ed. p. 250).

Condition of re-entry in lease.

Where a condition of re-entry was on non-payment of the rent by the space of one month after each quarter, and the demand of the rent was the 28th day after Christmas. *Held*, it was good: *Kirby* v. *Green* (1573), Lut. 1131 at p. 1139; 2 Nel. Lut. 461.

Submission to arbitration.

By deed of submission to arbitration an umpire's award was to be binding "so as it be made within six months next after the date of his appointment;" on August 16th the umpire was appointed and made his award on February 12th, 1817. *Held* that months meant lunar months and that the award was bad: *In re Swinford and Horn* (1817), 6 M. & S. 226.

Auctioneer.

The defendants employed the plaintiff, who was an auctioneer, to sell land upon certain terms as to commission, "half per cent. if not sold at auction or within two months after." The auction was held on 6th August, 1845, and on 2nd October the lands were sold private contract. *Held* that months meant lunar months. It is also clear that 'months' denote at law 'lunar months,' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months:'" per Denman, C.J., *Simpson* v. *Margitson* (1847), 11 Q. B. 23 at p. 31.

Engraver.

The defendant agreed to engrave a picture "in twenty-one months from the date of the receipt of the picture, having the original picture in my possession at intervals as may be agreed between ourselves for fourteen months." Month in this contract means lunar month. "The law, in all cases not mercantile transactions in the city of London, as to the meaning of the word month, meant lunar month. In all mercantile transactions in the city of London a month means

calendar month. But that is not the case here. The defendant is not a mercantile man, and I shall hold that in this contract month means lunar month, unless there is some evidence to show that calendar month was meant:" per Erle, C.J., *Turner* v. *Barlow* (1863), 3 F. & F. 946 at p. 949. So in an agreement for hiring furniture, month was held to be lunar month: *Hutton* v. *Brown* (1881), 45 L. T. 343.

Hiring furniture.

By an agreement, dated 29th September, 1902, the defendant granted to the plaintiff the exclusive option to purchase "during the period of six months" from the date thereof certain letters patent. The plaintiff and defendant were both aliens residing temporarily in London. In an action for specific performance it was held that months meant lunar months: *Bruner* v. *Moore*, [1904] 1 Ch. 305.

Option to purchase patents.

To the above examples may be added the following cases on statutes prior to 1850, in each of which month was held to be lunar month:—*Dormer* v. *Smith* (1601), Cro. Eliz. 835; *Wethered's Case* (1613), 2 Roll. Ab. 521 c, pl. 3; *Brown* v. *Spence* (1663), 1 Lev. 101; *R.* v. *Peckham* (1697), Comb. 439; *Lacon* v. *Hooper* (1795), 6 T. R. 224; *Hurd* v. *Leach* (1804), 5 Esp. 168; *Crooke* v. *McTavish* (1823), 1 Bing. 307.

Statutes prior to 1850.

In old law proceedings month meant lunar month: *Tullet* v. *Linfield* (1764), 3 Burr. 1455. "In legal proceedings the months mean lunar months unless the contrary appear to be the meaning from the subject-matter to which that term is applied:" per Bayley, J., *Johnstone* v. *Hudleston* (1825), 4 B. & C. 922 at p. 932. But the time allowed for redemption in a foreclosure decree is to be calculated according to calendar and not lunar months: *Anon.* (1740), Barnard. Ch. Rep. 324; 2 Eq. Ca. Abr. 605, pl. 38; and see per Fry, J., in *Hutton* v. *Brown* (1881), 45 L. T. 343.

Old law proceedings.

Foreclosure decrees.

The context may show that month means calendar month.

Context.

Thus where a sale was made on January 24th, abstract to be delivered in a fortnight and to be returned at the end of two months, draft to be delivered in three months and to be returned in four months, final payment to be made on June 24th following, (which made five calendar months from the sale), it was held that months meant calendar months: *Lang* v. *Gale* (1813), 1 M. & S. 111.

Agreement for sale.

The defendant became tenant of the premises on 29th October, 1810, under an agreement by which he was always to be subject to quit at three months' notice, it was *held* by Lord Ellenborough that this was a holding from three months to three months, and

Tenancy agreements.

therefore calendar months were intended: *Kemp* v. *Derrett* (1814), 3 Camp. 510.

A tenancy agreement dated December, 1829, was "for the term of six months from the 1st of January next, and so on from six months to six months until one of the said parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st day of July, 1830." *Held*, month meant calendar month: *Reg.* v. *Chawton* (1841), 1 Q. B. 247.

Ecclesiastical affairs.

The following are cases relating to ecclesiastical affairs in which month has been held to mean calendar month:—Co. 2 Inst. 361, n. 23; 2 Bl. Com. 276; *Catesby's Case* (1607), 6 Rep. 61 b; Cro. Jac. 166; Yelv. 100; Jenk. Cent. 282; *Copley* v. *Collins* (1616), Hob. 179; *Doctor Clea and his Chaplain* (1626), Litt. Rep. 19; *Sharp* v. *Hubbard* (1675), 2 Mod. 58; *Burton* v. *Woodward* (1692), 4 Mod. 95; 1 Show. K. B. 368; Comb. 191; Skinner, 313. The *Case of Albany and Bishop of S. Asaph* (1585), 1 Leon. 31, seems to be *contrà*.

Mercantile documents.

In mercantile documents month means calendar month.

In the older cases the judges seem to have held that even in mercantile documents month meant lunar month.

Defendant covenanted, upon payment of 500*l.* within one month next following, to transfer certain shares. Plaintiff tendered 500*l.* after twenty-eight days but within a calendar month. *Held*, month meant lunar month: *Barksdale* v. *Morgan* (1693), 4 Mod. 185. *Jocelyn* v. *Hawkins* (1720), 1 Stra. 446. But this is not now the law.

Bond.

In debt on a bond it was pleaded that the money was lent from August 24th to May 24th, and proved that it was lent for nine months. It was objected that this was a variance, for months must be lunar; but the Chief Baron (Gilbert) thought it well enough, the general understanding being of calendar months in cases of this nature: *Titus* v. *The Lady Preston* (1726), 1 Stra. 652.

Charter party.

Lord Kenyon left it to the jury to say whether a month in a charter-party meant a lunar or a calendar month; the jury said it was a calendar month: *Jolly* v. *Young* (1794), 1 Esp. 185.

Sale of wine.

Wines were sold "at twelve months' credit" and spirits "at four months' credit." "In commercial matters 'a month' always means a calendar month. In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters, it is so, and I know of no instance to the contrary:" per Pollock, C.B., *Hart* v. *Middleton* (1845), 2 Car. & Kir. 9 at p. 10.

But in *Bruner* v. *Moore*, [1904] 1 Ch. 305 at p. 311, it was said by Farwell, J., that the exception does not apply to all mercantile documents. "If any such exception be set up it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place." The exception is judicially recognised as to mercantile transactions in the city of London: per Erle, C.J., *Turner* v. *Barlow* (1863), 3 F. & F. 946 at p. 949. The *dictum* of Littledale, J., in *Reg.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247, was not meant to go further: per Farwell, J., *Bruner* v. *Moore*, [1904] 1 Ch. 305 at p. 311.

Quaere in London only.

Month was also held to mean calendar month in certain cases on statutes prior to 1850, viz.: *Wright* v. *Wheatley*, Noy, 37; *R.* v. *Cussens* (1664), 1 Sid. 186; *Devereux* v. *Bradstreet* (1784), Wallis, 338; *Biddulph* v. *St. John* (1805), 2 Sch. & Lef. 521.

Statutes prior to 1850.

A calendar month ends upon the day in the next ensuing month having the same number as that on which the computation began, but if the next ensuing month has no day which has the same number as that on which the computation began, then the calendar month ends on the last day of the next ensuing month, and where day is treated as a period of twenty-four hours at the same hour as that on which the computation began: *Freeman* v. *Read* (1863), 4 B. & S. 174; *Migotti* v. *Colville* (1879), 4 C. P. D. 233.

When month ends.

> A day is a period of twenty-four hours and each calendar day commences at midnight, the instant of midnight being common to both the preceding and succeeding day.

Meaning of day.

"Now divers nations begin the day at divers times . . . the Aegyptians and Romanes from midnight: and so doth the law in England in many cases:" Co. Litt. 135 a; 2 Bl. Com. 141.

> Although a day consists of a period of twenty-four hours, a day is, except in cases where it is necessary to distinguish acts done, or events happening, on the same day, considered at law as an indivisible period or *punctum temporis*.

Day is indivisible.

"For regularly the law maketh no fraction of a day:" Co. 3 Inst. 53.

Fractions of a day.

"In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day in order

to avoid disputes. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences:" Bl. Com. Bk. II. (8th ed. p. 141).

Age. In reckoning a man's age, if one be born on the 15th of February he will be of full age on the 14th of February: *Herbert* v. *Torball* (1663), 1 Sid. 162; 1 Keb. 589.

If one be born 1st February at 11 p.m. and live till 31st January in the twenty-first year, and make a will of lands at 1 a.m. and die, it is a good will, for he was then of age: *Anon.* (1704), 1 Salk. 44; S. C. *sub nom. Fitzhugh* v. *Dennington*, 2 Ld. Raym. 1094.

Service. If a man enters on a service on October 11th in the afternoon and serves till (including part of) October 10th following, he has served a year, for there are no fractions of a day: *R.* v. *Inhabitants of Syderstone* (1777), Cald. 19.

Tenancy. C. entered into possession of premises about noon, September 30th, 1850, and signed an agreement: "the tenancy is for one year, commencing on the 30th September *inst.*" He gave up possession on September 29th, 1851, about 4 p.m., to an incoming tenant by arrangement. *Held*, that C. had occupied for a whole year: *Reg.* v. *St. Mary, Warwick* (1853), 22 L. J. M. C. 109.

Ships. Where a ship was detained by the charterers for one day and a half beyond the lay days allowed for discharge, it was held that the charterers were liable to pay the shipowners demurrage for two whole days: *Commercial S.S. Co.* v. *Boulton* (1875), L. R. 10 Q. B. 346; 33 L. T. 707.

And where the charterers of a ship on time charter detained the ship for a few hours beyond the expiration of the charter it was held that they were liable to pay to the shipowner extra hire money for one whole day: *Angier Brothers* v. *Stewart Brothers* (1884), 1 Cab. & Ell. 357.

A day upon which only half a day's work in discharging a ship was done was nevertheless held to have been a whole lay day: *The Katy*, [1895] P. 56; *Branckelow S.S. Co.* v. *Lamport and Holt*, [1897] 1 Q. B. 570.

Where a charter party provided that cargo should be discharged "at the average rate of not less than 120 tons per weather working day," and a fraction of a day was required for completion of the discharge, *held* the charterer was entitled to the whole of that day: *Houlder* v. *Weir*, [1905] 2 K. B. 267.

Royal assent. And on this principle the giving of the royal assent to an Act of

Parliament has been referred to the first instant of the day on which it was given: *Tomlinson* v. *Bullock* (1879), 4 Q. B. D. 230.

Judicial acts.

It has been said that the Court will not inquire which of two judicial acts done on the same day was done first, for all judicial acts are referred to the first instant of the day on which they were done; but in *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 151; 8 Q. B. D. 63, some doubt was expressed as to the soundness of this doctrine.

But day may be treated as divisible.

> "But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish:" per Lord Mansfield, *Combe* v. *Pitt* (1763), 3 Burr. 1423 at p. 1434.

Action

Error was brought to reverse a judgment for slander on the ground that the plaint was entered the same day as the words spoken, but the action should be brought after the words, which could not be, for there are no fractions of a day, but Rolle, J., said it was well enough: *Symons* v. *Low* (1647), Styl. 72.

A declaration entitled generally of Michaelmas term is referred to the first day of term; the declaration laid the promise and breach on the first day of term. The defendant demurred on the ground that the declaration must be referred to the first instant of the day, and therefore was before the breach, but *held* that the declaration must be referred to the sitting of the Court on that day, and therefore there was time for the promise and breach to precede the declaration. Declaration is an act of the party and not a judicial act: *Pugh* v. *Robinson* (1786), 1 T. R. 116.

Title.

The lessor's ancestor died 1st January, 1771, at 5 a.m. The demise was laid in the declaration on the same 1st January, habendum from the 31st December then last past. A motion to set aside the verdict on the ground that, as the ancestor was living on the 1st January and there is no fraction of a day in fiction of law, he was alive all that day, and title did not accrue to the lessor of the plaintiff until the beginning of the next day, was dismissed: *Roe* d. *Wrangham* v. *Hersey* (1771), 3 Wils. 274.

On the same day as, but after, the sheriff had completed the sale of goods seized under a *fi. fa.*, and before he had paid the proceeds to the judgment creditor, a writ of extent against the goods of the same debtors tested that day was delivered to him. *Held*, the extent did not overreach the judgment creditor's right to the proceeds of sale: *Swain* v. *Morland* (1819), 3 J. B. Moore, 740; 1 Brod. & Bing. 370.

Bankruptcy.

Where the validity of an execution depends on its priority in relation to an act of bankruptcy and both occurred on the same day, it is open to inquire which occurred first: *Sadler* v. *Leigh* (1815), 4 Camp. 195.

A debtor's goods were seized by the sheriff before 2 p.m. After 6 p.m. on the same day the debtor surrendered in discharge of bail and lay in prison two months, whereby he became bankrupt. The plaintiffs were his assignees in bankruptcy and sued the sheriff for the goods so seized on the ground that in law the goods must be assumed to have been vested in them during the whole of the day of surrender. *Held*, that the interests of third parties being concerned the day might be divided into fractions: *Thomas* v. *Desanges* (1819), 2 B. & Ald. 586.

"The good sense of the matter is that where it is necessary to show which was the first of two acts, the Court is at liberty to consider fractions of a day:" per Patteson, J., *Chick* v. *Smith* (1840), 8 Dowl. 337 at p. 340.

Dog licences.

By sect. 5 of 30 Vict. (1867) c. 5, a licence to keep a dog "shall commence on the day on which the same shall be granted." *Held*, that a man who took out a licence at 1.10 p.m. on October 21st could be convicted of the offence of keeping a dog without a licence on October 21st, it being proved that he kept the dog at 12.40 p.m. on that day: *Campbell* v. *Strangeways* (1877), 3 C. P. D. 105. "The law will distinguish the fractions of a day, viz., where it is necessary . . . for the purposes of the decision to show which of two events first happened:" per Grove, J., *Ibid.* at p. 107.

Issue of writ.

A writ was issued on the same day on which, but after, the cause of action arose. *Held*, on demurrer, that the Court could take cognisance of the fact that the writ did not issue till after the cause of action accrued, notwithstanding the legal doctrine that a judicial act is referred back to the first moment of the day on which it is done: *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 151; 8 Q. B. D. 63; by C. A. on the ground that the issue of a writ in a civil action is the act of the party.

In consequence of the rule that fractions of a day are not regarded, and that a day is indivisible, it follows that—

Days mean calendar days.

> In computing the lapse of time by days, calendar days are meant, but the context or other admissible evidence may show that calendar days are not meant.

The following cases are instances of the rule:—*R.* v. *Inhabitants of Syderstone* (1777), Cald. 19; *R.* v. *St. Mary, Warwick* (1853), 22

L. J. M. C. 109; *Commercial S.S. Co.* v. *Boulton* (1875), L. R. 10 Q. B. 346; 33 L. T. 707; *The Katy*, [1895] P. 56; *Branckelow S.S. Co.* v. *Lamport and Holt*, [1897] 1 Q. B. 570.

Unless otherwise agreed.

As regards the qualification, the parties may by express words agree that the days shall not be calendar days but periods of twenty-four hours, commencing at any moment, *e.g.*, at noon: *Angier Bros.* v. *Stewart Bros.* (1884), 1 Cab. & Ell. 357; *Yeoman* v. *The King*, [1904] 2 K. B. 429; and, inasmuch as in marine insurance policies a period of twenty-four hours after arrival is covered by the policy, it has been held that days added to or substituted for such period of twenty-four hours are also periods of twenty-four hours after arrival: *Mercantile Marine Insurance Co.* v. *Tithering-ton* (1864), 5 B. & S. 765; *Cornfoot* v. *Royal Exchange Assurance Co.*, [1903] 2 K. B. 363; [1904] 1 K. B. 40.

Or by context.

Days are consecutive.

Further, in charter-parties and bills of lading, in the absence of context or usage to the contrary, days and running days mean consecutive days without the exception of Sundays, holidays, or days on which, through stress of weather, work is impossible: *Brown* v. *Johnson* (1842), Car. & M. 440 at pp. 444 and 448; 10 M. & W. 331 at p. 334; *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67: per Lord Esher, M.R., at p. 72.

Working days.

"Working days" mean days on which it is lawful or customary to work, and include such days, though work is prevented by stress of weather, and days on which work is actually done, though it is not strictly lawful or customary to do work thereon: *Thiis* v. *Byers* (1876), 1 Q. B. D. 244; *Holman* v. *Peruvian Nitrate Co.* (1878), 5 Sess. Cas. 4th Ser. 657; *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67: per Lord Esher, M.R., at p. 71.

The contrary was held, by context, in *Commercial S.S. Co.* v. *Boulton* (1875), L. R. 10 Q. B. 346; and by usage, in *Cochran* v. *Retburg* (1800), 3 Esp. 121; *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67.

From a date is exclusive of that date.

> In computing a period of time from the date, or the day of the date, of a deed, or any fixed day—that day is *primâ facie* to be excluded, but the context or other admissible evidence may show that it is to be included.

Rule inflexible till 1777.

The old rule was that such day was excluded, and could not be included: Co. Litt. 46 b; Co. 2 Inst. 674, note 10; *Thomas* v. *Popham* (1562), 2 Dyer, 218 b; S. C. *sub nom. Anon.*, Moore, 40; *Clayton's Case* (1585), 5 Rep. 1; *Barwick's Case* (1597), 5 Rep. 93 b at p. 94 a, b; S. C. *sub nom. Berwick's Case*, Moore, 393; *Douglas* v.

Shank (1600), Cro. Eliz. 766; *Butler* v. *Fincher* (1614), 2 Buls. 302; *Seybrooke* v. *Ball* (1617), 1 Roll. Abr. 828, pl. 2; *Scavage* v. *Parker* (1622), Cro. Jac. 647; *Bull* v. *Wyot* (1634), *Digby* v. *Jordan* (1635), 1 Roll. Abr. 828, pl. 1; *Cornish* v. *Cawsy* (1648), Aleyn, 77; *Watts* v. *Dix* (1649), Styl. 189 and 204; *Goodgaine* v. *Wakefeild* (1660), 1 Sidf. 7; *Evans* v. *Crocker* (1688), 3 Mod. 198; *Sir R. Howard's Case* (1699), 2 Salk. 624; Ld. Raym. 480; Holt, 195; *Denn* d. *Warren* v. *Fearnside* (1747), 1 Wils. 176; *Doe* d. *Bayntun* v. *Watton* (1774), Cowp. 189; *Watson* v. *Pears* (1809), 2 Camp. 294.

This rule was adhered to, as a strict and inflexible rule of construction, down to Lord Mansfield's judgment in *Pugh* v. *Duke of Leeds* (1777), Cowp. 714, and the Courts were forced to resort to various devices to avoid the inconveniences and hardships which consequently arose.

Devices to get over rule.

Thus, in cases of leases for lives executed on the day of the date, habendum from the day of the date, which were consequently bad as creating freehold estates *in futuro*, if livery of seisin was made after the date, it was held by some Judges that the leases were thereby made good, for the estate passed by the livery and not by the deed: 1 Roll. Abr. 828, pl. 4; *Mellow* v. *May* (1601), Moore, 636; *Banks* v. *Brown* (1605), Moore, 759; *Smith* v. *Bole* (1617), Cro. Jac. 458, and a similar device was resorted to in *Freeman* d. *Vernon* v. *West* (1763), 2 Wils. 165 (*contrà Hennings* v. *Pauchard* (1607), Cro. Jac. 153); and in some cases a distinction was drawn between "from the day of the date," which excluded such day, and "from the date," which was said to include such day. This distinction was probably based on the fact that the Latin substantive "*datus*" etymologically means "the act of giving," and was so used in classical Latin, so that "*a datu*" might with considerable propriety be translated into English "from the giving," *i.e.*, the delivery, of the deed. See *Rooke and Richard's Case* (1633), Hale's MSS. fol. 6, cited note 8 to Butler and Hargrave's Co. Litt. 46 b; *Osbourn* v. *Rider* (1605), Cro. Jac. 135; *Anon.* (1611), 1 Buls. 177, per Fleming, C.J.; *Hatter* v. *Ashe* (1696), 3 Lev. 438; 1 Ld. Raym. 84; S. C. *sub nom. Haths* v. *Ash*, 2 Salk. 413. But this distinction was not recognised by Coke or by all Judges: Co. Litt. 46 b; *Clayton's Case* (1585), 5 Rep. 1; *Bacon* v. *Waller* (1616), 3 Buls. 203; 1 Roll. Rep. 387; and in modern English it is clear that "the day of the date" and "the date" mean the same thing: *Pugh* v. *Duke of Leeds* (1777), Cowp. 714.

Rule now gives way to intention.

But since *Pugh* v. *Duke of Leeds* (1777), Cowp. 714, it cannot be said that the rule that from the day of the date excludes such day

is inflexible. In that case there was a power in a settlement to make leases in possession; the donee of the power made a lease in intended exercise of the power, habendum from the day of the date of the lease. Lord Mansfield, on the principle *ut res magis valeat quam pereat*, held that the term commenced on the day of the date.

Patents.

In *Russell* v. *Ledsam* (1845), 14 M. & W. 574, it was held that the term of fourteen years from the date thereof, for which a patent dated 26th February, 1825, had been granted, expired at midnight on the 25th of February, 1839, on the ground that if there had been an imitation on the day of the grant it would have been an infringement, and the patent was only for twenty-one years, not for twenty-one years and one day.

Context.

So a demurrer to a declaration was overruled on the ground that the context showed that the word "from" was used inclusively. "The demurrer therefore is wrong in assuming that the word must be exclusive; though I agree that *primâ facie* it is so," per Patteson, J., *Wilkinson* v. *Gaston* (1846), 9 Q. B. 137 at p. 145.

But the presumption still is that the day in question is excluded.

Tenancy.

A lease, habendum from 25th March, 1809, for twenty-one years expires at midnight on 25th March, 1830. "The general understanding is that terms for years last during the whole anniversary of the day from which they are granted," per Denman, C.J., *Ackland* v. *Lutley* (1839), 9 Ad. & E. 879 at p. 894, and per Shadwell, V.-C., *Gorst* v. *Lowndes* (1841), 11 Sim. 434 at p. 436.

Statutes.

By 16 & 17 Vict. (1852), c. 5, s. 2, "all letters patent shall be made subject to the condition that the same shall be void . . . at the expiration of three years . . . from the date thereof unless there be paid before the expiration of the said three years" certain stamp duties. Letters patent dated 26th February, 1855, were issued subject to this condition; the duty was paid on 26th February, 1858. *Held*, the payment was in time, "If the language of the Act had been three years from the day of the date thereof then there can be no doubt that the three years would not have begun to run until the following day, for when the time for doing an act begins to run from a particular date it commences on the day following. Here the words are, from the date thereof, which are synonymous:" per Lord Romilly, M.R., *Williams* v. *Nash* (1859), 28 B. 93, at pp. 94, 95.

Policy.

A policy of insurance for twelve calendar months from November 24th, 1887; an accident occurred on November 24th, 1888. *Held*, November 24th, 1887, was excluded from, and

November 24th, 1888, was included in, the twelve months: *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402.

"The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done the day of the date is to be excluded," per Mathew, L.J., *Goldsmiths' Co.* v. *West Metro. Ry.*, [1904] 1 K. B. 1 at p. 5.

On a date is inclusive of that date.

> In computing a period of time which commences on a fixed day, that day is included.

Thus, on an agreement to let a house to a yearly tenant commencing *on* the 19th of May the tenancy ends on the 18th of May following: *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378; *Sheffield Corporation* v. *Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

From an event includes day on which event happens.

> In computing a period of time from the doing of an act or the happening of an event, the day on which the act is done or the event happens is *primâ facie* to be included, but the context or other admissible evidence may show that it is to be excluded, and more especially if a different method of computation would cause a forfeiture or loss of status or liberty.

Rule originally inflexible,

The rule was treated as inflexible until towards the end of the eighteenth century: Co. Litt. 46 b and note 255 a; Co. 3 Inst. 53; *Clayton's Case* (1585), 5 Rep. 1; *Higham and Cooke's Case* (1589), 4 Leon. 144; *Norris* v. *Hundred of Gawtry* (1616), Hob. 139; 1 Brownl. & G. 156; Moore, 878 (this report is wrong); *Scavage* v. *Parker* (1622), Cro. Jac. 647; *Cornish* v. *Cawsey* (1648), Aleyn, 77; *Clark's Case* (1653), Styl. 382; *Bellasis* v. *Hester* (1698), 1 Ld. Raym. 280; S. C. *sub nom. Belasyse* v. *Hester*, Lutw. 1589; *R.* v. *Adderley* (1780), 2 Dougl. 463; *Castle* v. *Burditt* (1790), 3 T. R. 623; and it was first disregarded in *Ex parte Fallon* (1793), 5 T. R. 283, where a deed which was required by statute to be enrolled within twenty days of the execution was executed on the 6th of June and enrolled on the 26th, and it was held that it was enrolled in time; and in *Lester* v. *Garland* (1808), 15 Ves. 248, where an interest under a will was to be forfeited if a certain act was not done within six calendar months after the testator's decease; the testator died on January 12th, and the act was done on July 12th, and was held to have been done in time. And since those cases "no general rule

but now gives place to intention.

exists for the computation of time either under the Bankruptcy Act or any other statute, or indeed where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made:" per Lord Esher, M.R., *In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264 at p. 269; and accordingly in the following cases the day was excluded.

Power to redeem.

The statutes give an Irish tenant power to redeem his holding after he has been ejected for non-payment of rent "within six months after execution executed." Execution was executed on November 30th, and the bill to redeem filed on May 30th. *Held*, following *Ex parte Fallon*, and rejecting the construction which would work a forfeiture, that the six months were to be computed exclusively of the day on which execution was executed: *Dowling* v. *Foxall* (1809), 1 Ball & B. 193.

Notice of damage.

By 9 Geo. I. (1722) c. 22, no person shall recover any damages under that Act unless he, within two days after such damage or injury done him, shall give notice. The damage was done on a Saturday, the notice was given on Monday. *Held*, the notice was in time: *Pellew* v. *Hundred of East Wonford* (1829), 4 Mann. & Ry. 130; 9 B. & C. 134.

Time for action.

By 24 Geo. II. (1750) c. 44, "no action shall be brought against any justice of the peace unless commenced within six calendar months after the act committed." The plaintiff was discharged from prison on December 14th; on June 14th following he began an action against the magistrate. *Held*, the suit was begun in time: *Hardy* v. *Ryle* (1829), 4 Mann. & Ry. 295; 9 B. & C. 603.

Payment for goods.

Contract on 5th October for sale of goods to be paid for in two months. Writ issued 5th December. *Held*, on motion for new trial, that (*a*) months having been treated by both parties at the trial as calendar months, it was too late to argue that they were lunar months; and that (*b*) the day of the contract was to be excluded: *Webb* v. *Fairmaner* (1838), 3 M. & W. 473. "The party is to have two entire calendar months in which to make payment exclusively of the day of sale:" per Parke, B., *Ibid.* at p. 476.

Time for award.

An umpire was to make his award "within five calendar months next after the said matters shall be referred to him." He was appointed on June 29th, and made his award on November 29th. *Held*, it was made in time: *In re Higham and Jessop* (1840), 9 D. P. C. 203.

Filing warrants.

By 3 Geo. IV. (1822) c. 39, "warrants of attorney shall be filed within twenty-one days after the execution." *Held*, a warrant

executed 9th December and filed 30th December was filed in time: *Williams* v. *Burgess* (1840), 12 Ad. & E. 635.

Sale under distress.

By 2 W. & M. (1690), sess. 1, c. 5, s. 2, "where any goods or chattels shall be distrained for any rent . . . and the tenant . . . shall not within five days next after such distress taken and notice thereof left . . . replevy the same . . . then . . . after such distress and notice as aforesaid and expiration of the said five days" the person distraining may sell. Seizure and notice on Saturday, sale on following Thursday. Motion for new trial on the ground that the five days were to be reckoned exclusively of the day of seizure. Rule absolute for new trial: *Robinson* v. *Waddington* (1849), 13 Q. B. 753; 18 L. J. Q. B. 250.

Time for living in place for marriage.

By 19 & 20 Vict. (1856) c. 96, s. 1, "no irregular marriage contracted in Scotland . . . shall be valid unless one of the parties . . . had lived in Scotland for twenty-one days next preceding such marriage." The parties entered Scotland about 4 a.m. on July 1st; they contracted an irregular marriage between 11 and 12 a.m. on July 21st. *Held*, the marriage was invalid: *Lawford* v. *Davies* (1878), 4 P. D. 61.

Time for action.

By 12 & 13 Vict. (1849) c. 92, s. 14, every complaint is to be made within "one calendar month after the cause of such complaint shall arise." An information was laid on June 30th in respect of an act committed on the preceding May 30th. *Held*, that it was in time: *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161.

Act of bankruptcy.

Under the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1, a debtor commits an act of bankruptcy if his goods are seized in execution and "held by the sheriff for twenty-one days." *Held*, that the day on which the sheriff seizes is not to be included as one of the twenty-one days: *In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264.

Cesser of powers.

Under a special Act incorporating the Lands Clauses Act, 1845, a company was empowered to take lands compulsorily, but such power was to "cease after the expiration of three years from the passing of this Act," the Act received the royal assent on August 9th, 1899, and a notice to treat was served under it on August 9th, 1902. *Held*, the notice was served within the time limited: *Goldsmiths' Co.* v. *West Metropolitan Ry.*, [1904] 1 K. B. 1.

Provisional orders.

Where it was necessary to ascertain which of two provisional orders confirmed by statutes passed upon the same day first came into operation, and they provided that one came into operation on the day of the passing, and that the other took effect from and after the passing of the statute. *Held*, the former was the first to

come into operation: *Sheffield Corporation* v. *Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

General rule still applies.

But where there is no such reason for excluding the day in question the rule still is that it is included: *Glassington* v. *Rawlins* (1803), 3 East, 407; *Ex parte Farquhar, Re Starkey* (1826), Mont. & Mac. 7; *Cowie* v. *Harris* (1827), 1 Moo. & M. 141; *Higgins* v. *Macadam* (1829), 3 Y. & J. 1; *Godson* v. *Sanctuary* (1832), 4 B. & Ad. 255; *R.* v. *Justices of West Riding* (1833), 4 B. & Ad. 685; *R.* v. *Justices of Cumberland* (1835), 4 N. & M. 378; S. C. *sub nom. R.* v. *Goodenough*, 2 Ad. & E. 463; *Re Prangley* (1836), 4 Ad. & E. 781; *Ex parte Whitby* (1839), 1 Mont. & Ch. 671.

Contract not to be performed within the year.

A contract made on one day to serve a year from the next day is a contract not to be performed within a year, and is therefore within the Statute of Frauds: *Dollar* v. *Parkington* (1901), 84 L. T. 470. There are *dicta* to the contrary in *Cawthorne* v. *Cordrey* (1863), 13 C. B. N. S. 406; and *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123; and *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285 and 538, is a decision to the contrary; but those *dicta* and that decision appear to rest on a confusion between the day on which the service commences and the day on which the contract is made.

"Clear" days.

"At least."

"Or more."

"Not less."

Certain phrases have been construed to mean that the term is to be computed exclusively of the day in question, *e.g.*, "clear" days: *R.* v. *Justices of Herefordshire* (1820), 3 B. & Ald. 581; so many days "at least:" *Zouch* v. *Empsey* (1821), 4 B. & Ald. 522; *R.* v. *Justices of Shropshire* (1838), 8 Ad. & E. 173; *Mitchell* v. *Foster* (1840), 12 Ad. & E. 472; *Young* v. *Higgon* (1840), 6 M. & W. 49; *Freeman* v. *Read* (1863), 4 B. & S. 174; *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico*, [1893] 1 Ch. 484, n. at p. 489; "a month or more:" *Blunt* v. *Heslop* (1838), 8 Ad. & E. 577; "not less than:" *Chambers* v. *Smith* (1843), 12 M. & W. 2; *In re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204.

Till and until are ambiguous.

"Till" and "until" are both ambiguous, and may be either inclusive or exclusive.

A release of all actions until a named day is not a release of an action the cause of which arises on that day, and where something is not to be done till such a day or such an hour it may be done on the day or at the hour. And where a period of time is allowed

until such a day, or such an hour within which an act is to be done, the act may be done on the day or at the hour. And generally if some state of circumstances is to continue until such a day, the whole of that day is included, *e.g.* a lease until Michaelmas includes Michaelmas.

Lease.

A man made a lease for life, rendering rent at Michaelmas, and further leased the same to the executors of the lessee until Michaelmas, after the death of the lessee. It was affirmed by Cook that in this case it was adjudged that the word "until" shall be construed to extend to (*sic*) the term unto the end of the feast of St. Michael, and so the rent then due payable by the executors, for without such construction no rent should be then due because the term ended before Michaelmas: *Anon.* (1588), 3 Leon. 211.

Releases.

Bond dated 9th July is not discharged by a release dated the same day releasing all actions *usque diem dati ejusdem scripti*, for the release excludes the 9th day on which it was made: *Newman* v. *Beaumond* (1593), Owen, 50.

A release and an obligation bore the same date: the release was of all, &c., *usque ad diem datus;* the obligation was not discharged: *Green* v. *Wilcocks* (1622), 2 Roll. Rep. 255.

"A., on 2nd August, 1 Jam., makes an obligation to B., and afterwards on the same day B. releases all actions *usque datum scripti:* the obligation is discharged because date is delivery. Otherwise if it had been to the day of the date:" *Rooke* v. *Richards* (1633), Hale's MSS. fol. 6 a, cited in Hargrave and Butler's note (8) to Co. Litt. 46 b. As to this distinction, see *suprà* p. 164.

A question arose on a plea whether *usque ad* 24th April included or excluded that day. Three Justices (North, C.J., *dissentiente*) were of opinion that the word *usque* was exclusive, and said that in a release of all demands till the 26th of April a bond dated that day is not released: *Nichols* v. *Ramsel* (1677), 2 Mod. 280.

To an action for trespass the defendant pleaded a general release of all actions, &c., *usque ad diem datus* of the release. The trespass was on the day of the date of the release, and it was held that the action was not discharged, for the release did not include that day: *Dixon* v. *Terry* (1693), 4 Mod. 182.

Occupancy.

In an action by the lord of a manor for an amerciament it was necessary to show that the party amerced was an inhabitant within the manor both at the date of the offence and at the date of the holding of the Court leet at which he was amerced. It appeared on the record that defendant was an inhabitant from —— continually till 27th October in the seventh year of George II. The Court leet

at which the amerciament was made was held on October 27th, *anno* 7 Geo. II. After verdict for plaintiff it was argued in error that "till" was exclusive; it was held that though it might have been bad on demurrer, it was cured by verdict: *Wicker* v. *Norris* (1735), Ca. in K. B. temp. Hardwicke, 116.

Service.

A hiring on the day after Old Michaelmas until next Old Michaelmas, and service beginning on the day of hiring and ending on next Old Michaelmas, is hiring and service for a year so as to give a settlement: *R.* v. *Inhabitants of Navestock* (1772), Burr. Settlt. Cases, 719.

A man hired himself on the day after Martinmas to serve thenceforth until next Martinmas. *Held*, on a question of pauper's settlement, that "until" was to be construed inclusively: *R.* v. *Inhabitants of Skiplam* (1786), 1 T. R. 490.

Award.

Where an arbitrator's award was to be made on or before the first day of Michaelmas term, and the time was extended on motion by consent till the first day of Hilary term. *Held*, the award being made on the first day of Hilary term was good: *Knox* v. *Simmonds* (1791), 3 Bro. C. C. 358.

An arbitrator under a power in the submission enlarged the time for making his award "until the 1st of July next." On the 1st of July he made his award, and it was held that the award was made in time. "There is no absolute rule as to the meaning to be attached to the word 'until,' as it may be construed either as inclusive or exclusive, as it may with strict propriety mean either:" per Williams, J., *Kerr* v. *Jeston* (1842), 1 Dowl. N. S. 538 at p. 539.

Employment.

In an indictment against certain officers of the East India Company under 33 Geo. III. (1793) c. 52, s. 62, it was alleged that the defendants were officers of the company until November 29th, 1795, and that whilst such officers and residing in India, viz., on the 29th November, 1795, &c. *Held*, "until" may be read either inclusively or exclusively: *R.* v. *Stevens and Agnew* (1804), 5 East, 244.

Time to plead.

Order of Judge that the defendant shall have till Tuesday next time to plead. "I meant the word 'till' to include the Tuesday. The plaintiff was irregular in signing judgment on that day:" per Patteson, J., *Dakins* v. *Wagner* (1835), 3 Dowl. 535 at p. 536.

Execution.

Stay of execution until the 1st of May next, and on that day execution was issued. It was held that the writ of execution was properly issued. "I think the word 'until' does not mean after; it cannot mean that according to the grammatical construction:"

per Burton, J. "I do not think that this differs from the case of an attachment not issuing until such a day:" per Crampton, J., *Rogers* v. *Davis* (1845), 8 Ir. L. R. 399 at p. 400.

Protection order.

An order was made under the Bankrupt Law Consolidation Act 1849, that the persons and property of the petitioners be protected from process until the 29th of July next, and it was held that the protection extended over the whole of July 29th. "The word 'until' is ambiguous, and may be construed either inclusive or exclusive of the day mentioned, according to the subject-matter and the true intent of the document in which it is used (*R.* v. *Stevens* (1804), 5 East, 244). In this order there can be no doubt it includes the whole of the 29th of July, for it appoints twelve o'clock of that day as the day of meeting of the creditors and the petitioners, and no doubt the Court intended that until after meeting the protection should extend:" per Watson, B., *Bellhouse* v. *Mellor* (1859), 4 H. & N. 116 at p. 124; S. C. *sub nom. Backhouse* v. *Mellor*, 28 L. J. Ex. 141; 5 Jur. N. S. 175.

Insurance.

"From the 14th day of February, 1868, until the 14th day of August, 1868," in a policy of insurance against fire. *Held*, the goods were covered during the whole of August 14th without deciding that they were not covered during the whole of February 14th: *Isaacs* v. *Royal Insurance Co.* (1870), L. R. 5 Exch. 296.

"To" and "from" used with regard to place.

Whether "to" and "from," when used in regard to place, do or do not include the place seems very doubtful. Thus an indictment for stopping at Kensington the King's highway leading from London to Kensington was quashed, for it alleged the stopping at Kensington a road leading to Kensington, which excludes Kensington: *Halsey's Case* (1626), Latch, 183.

A turnpike Act (26 Geo. II. (1753) c. 54) described a road as leading "to and from" Battel. *Held*, the town of Battel was excluded: *Hammond* v. *Brewer* (1757), 1 Burr. 376.

Indictment for not repairing a highway leading from the hamlet of Roxeth in the parish of Harrow, and that a certain part of said highway in Harrow leading from a part in Roxeth to another part in Harrow was, &c. Objection that the hamlet is excluded. *Sed* per Curiam: The indictment does not say that the part which is out of repair is in the hamlet. The hamlet is excluded, but there is no repugnancy in the indictment: *R.* v. *Inhabitants of Harrow* (1767), 4 Burr. 2090.

An indictment for not repairing a road leading from H. towards and unto G. quashed on the ground that "unto" is exclusive, and therefore the road was not in the parish of G.: *R.* v. *Inhabitants*

of Gamlingay (1790), 3 T. R. 513. But after conviction on an indictment for wrongfully damaging a culvert in the parish of Studley in a certain King's common highway there leading from Studley to H., a motion was brought in arrest of judgment, on the ground that it did not sufficiently appear that the road obstructed was in the parish of Studley, and it was held that "to" and "from" were not necessarily exclusive, and *R.* v. *Gamlingay* was doubted and distinguished: *R.* v. *Knight* (1827), 7 B. & C. 413.

How deeds are dated.

"The day of the moneth and the yeare of our Lord and Saviour Christ and the yeare of the King's raigne are the usuall dates of deeds. And the day of the moneth by the nones, ides, or kalends is sufficient:" Co. 2 Inst. 675, note 10. In older deeds the King and a layman date by the regnal year, a bishop by the year of his pontificate, and a clerk by the year of grace. See De Placitis et Curiis Tenendis, printed in "The Court Baron" by the Selden Society (Sel. Soc. Pub., vol. 4), p. 71.

But the modern practice is to date by the day of the month and the year of grace only, except in some official documents of the King or a bishop, in which the old practice is continued.

But the date written on a deed is not of much importance, for—

A deed takes effect from delivery, not from its date.

Deed takes effect from delivery.

The authorities for this proposition are: Y. B. 14 Edw. III. (1341), p. 276, pl. 11; Shep. Touch. 72; *Ludford* v. *Gretton* (1575), Plow. 490 at p. 491 a; *Goddard's Case* (1584) 2 Rep. 4 b; *Clayton's Case* (1585), 5 Rep. 1; *Doe* d. *Whatley* v. *Telling* (1802), 2 East, 257; *Doe* d. *Cox* v. *Day* (1809), 10 East, 427; *Steele* v. *Mart* (1825), 4 B. & C. 272; but the presumption is that a deed is delivered on the day of its date: *Stone* v. *Grubbam* (1614), 1 Roll. Rep. 3.

But delivery presumed to have been on date.

"All deeds do take effect from, and therefore have relation to, the time not of their date but of their delivery; and this is always presumed to be the time of their date, unless the contrary do appear:" Shep. Touch. 72.

"From henceforth."

A demise by deed to hold "from henceforth," means from the delivery, not from the date: Co. Litt. 46 b; *Clayton's Case* (1585), 5 Rep. 1; and includes the day of delivery.

"Until the making."

"Until the making of these presents" means up to the delivery: *Hedley* v. *Joans* (1572), Dy. 307 a, pl. 67.

"Now."

The words of the deed that he should pay for the corn then (*tunc*) laden or afterward to be laden therein: this word "*tunc*" is

referred to the time of the essence of the deed by the delivery and not to the date. "If one covenants that J. S. shall have all his trees now standing, it refers to the trees standing at the time of delivery, and if any be felled after the date and before the delivery, he hath not any remedy for them:" per Fleming, J., *Oshey* v. *Hicks* (1610), Cro. Jac. 263.

"Now last past."

A day "now last past" means last preceding the day of the delivery, not of the date: *Steele* v. *Mart* (1825), 4 B. & C. 272; 6 Dowl. & Ry. 392.

"The rule uniformly acted upon from the time of *Clayton's Case* to the present day is that a deed or other writing must be taken to speak from the time of its execution, and not from the date apparent on the face of it. That date is indeed to be taken *primâ facie* as the true date of execution, but as soon as the contrary appears, the apparent date is to be utterly disregarded:" per Patteson, J., *Browne* v. *Burton* (1847), 5 Dow. & Lownd. 289 at p. 292; 2 Bail Court Rep. 220; 17 L. J. Q. B. 49.

A mortgage deed, dated the 27th day of October, 1827, was executed on the 23rd of August, 1834. No interest was ever paid. On the 9th of February, 1854, the mortgagee issued a writ of ejectment. *Held*, that the deed was a sufficient acknowledgment of the plaintiff's title within 3 & 4 Will. IV. (1833) c. 27, s. 14. "If then the deed is to be construed as speaking from the time of its date, the plaintiff's right of entry was barred by the statute; but if, on the other hand, the deed is to be read as speaking from the time of its execution, then there was a sufficient acknowledgment of the plaintiff's title within the meaning of the statute. We are all of opinion that the deed must be taken to speak from the time of its execution:" per Pollock, C.B., *Jayne* v. *Hughes* (1854), 10 Ex. 430 at p. 433.

Evidence admissible to prove true date.

Evidence is admissible to prove the true date, *i.e.*, time of delivery of a deed.

Deeds without date.

"The date of the deed many times antiquity omitted; and the reason thereof was, for that the limitation of prescription, or time of memory, did often in process of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deeds without date, to the end that they might allege them within the time of prescription:" Co. Litt. 6 a.

"Also a deed is good albeit it mentions no time or place of date

or making, or have a false date, *i.e.*, be dated at one time and delivered at another; and albeit it have an impossible date, as the 30th of February and the like, for anciently until the time of Edw. II. and Edw. III., the deed had no date; because the law was then held to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date, must set forth the time when it was delivered (*Dodson* v. *Kayes* (1610), Yelv. 193), and support the averment by proof:" Shep. Touch. 55.

False date.

"Not but a deed is good although it mention no date; or hath a false date; or even if it hath an impossible date, as the 30th of February: provided the real day of its being dated or given, that is, delivered, can be proved:" Blackst. Com. II. 20 (8th ed., p. 304).

Impossible date.

"The date of a deed is not of the substance of a deed: for if it hath no date, or hath a false or impossible date, as the 30th day of February, yet the deed is good:" *Goddard's Case* (1584), 2 Rep. 4 b; *Dodson* v. *Kayes* (1610), Yelv. 193; S. C. *sub nom. Dodson* v. *Keyes*, 1 Brownl. & Gold. 110; *sub nom. Dobson* v. *Keys*, Cro. Jac. 261.

"An impossible date is no date, and where there is no date the plaintiff nevertheless must declare of it as made at a certain time:" per Curiam, *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; Holt, 502; S. C. *sub nom. Cromwell* v. *Grumsden*, 1 Ld. Raym. 335; *sub nom. Cromwell* v. *Grimsdale*, Comb. 477; *sub nom. Crumwell* v. *Grunsdale*, 5 Mod. 278; *sub nom. Cromwell* v. *Grumsdale*, 12 Mod. 193.

Date proved.

Deed dated the 10th October, proof allowed that it was first delivered the 30th March. "For God forbid, when a deed is duly made, that by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed and be without remedy:" *Stone* v. *Bale* (1692), 3 Lev. 348. *Hall* v. *Cazenove* (1804), 4 East, 477; *Steele* v. *Mart* (1825), 4 B. & C. 272; *Cooper* v. *Robinson* (1842), 10 M. & W. 694; *Doe* d. *Cox* v. *Day* (1809), 10 East, 427; and *Jayne* v. *Hughes* (1854), 10 Exch. 430, are other cases in which evidence was admitted to prove when a deed was delivered.

Reference to date, how construed.

"Where a deed bears no date, or an impossible date, and in the deed reference is made to the "date," that word must be construed "delivery;" but if the deed bears a sensible date, the word "date," occurring in

the deed, means the day of the date, and not that of the delivery:" per Bayley, J., *Styles* v. *Wardle* (1825), 4 B. & C. 908 at p. 911; 7 D. & R. 507 at p. 510.

"If an indenture of lease bear date which is void or impossible, as the 30th day of February, or the 40th of March, if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all:" Co. Litt. 46 b.

Where an undated award ordered that a certain act should be done within fifty-eight days, *a datu scripti arbitrii*, held there was no uncertainty, for if the award had no date the time must be computed from delivery, and that was one sense of *datus: Armitt* v. *Breame* (1704), Ld. Raym. 1076 at p. 1082; 1 Salk. 76; S. C. *sub nom. Arnote* v. *Breame*, 6 Mod. 244; *sub nom. Armote* v. *Bream*, Holt, 212.

Obligation dated and delivered 1st May, and on 1st June following obligee makes a release to obligor bearing date 1st March and delivered 1st June, by which he releaseth all actions until the date of the release. *Held*, the obligation was not released: *Sir William Drury's Case* (1582), Cro. Eliz. 14.

A release of all actions until this present day: this present day means the day of the date, not of delivery, and therefore the release does not discharge a bond dated and made after the date, but before the delivery of the release: *Anon.* (1609), 2 Brownl. & G. 300; Hale's MSS., fo. 6; cited note to Co. Litt. 46 b (Butler's ed., 1832).

Under a power to demise in possession and not in reversion, a lease dated 17th February, habendum from March 25th next ensuing the date thereof, but executed after March 25th, is good: *Doe* d. *Cox* v. *Day* (1809), 10 East, 427.

Day in same month.

A bond bearing date 1st May, conditioned for payment of money on the 15th day of May next ensuing, means the 15th of the same month: *Prescot* v. —— (1622), Cro. Jac. 646.

Obligation bearing date 5th May, conditioned to pay money on the 11th day of May next ensuing; it means the same May: *Anon.* (1622), 2 Roll. Rep. 255.

Leap year.

Where by a deed made in August, 1832, being leap-year, a party covenanted to pay a sum of money on 29th February next ensuing, the words, "29th February next ensuing" were construed to mean 29th February in the next leap-year: *Chapman* v. *Beecham* (1842), 3 Q. B. 723; 3 Gale & Dav. 71.

Evidence is admissible to explain an erroneous reference to the

date of another instrument: *Honywood* v. *Honywood* (1843), 2 Y. & C. C. C. 471.

Evidence may be adduced to correct an erroneous or imperfect name or description of any party to a deed. See 1 Dav. Prec. 41 (5th ed.), p. 33.

Evidence to correct name or description of parties.

"The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain; and, therefore, howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation, by the true name whereby the corporation is made, yet mistakes in this case, unless they be very gross, will not make void the grant; *nihil facit error nominis cum de corpore constat:*" Shep. Touch. 233.

Name of baptism.

"Regularly it is requisite that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism; for that a man cannot have two names of baptism, as he may have divers surnames:" Co. Litt. 3 a; *MacDonnogh* v. *Stafford* (1619), Palm. 100. In strictness all the names of baptism compose but one christian name: per Sir W. Scott, *Pougett* v. *Tomkyns* (1812), 3 M. & S. 262, n. at p. 263; see also *Scott* v. *Soans* (1802), 3 East, 111; *Evans* v. *King* (1745), Willes, 554.

"But a person may be baptized by the name of A. and confirmed by the name of B., as Sir Francis Gawdy was; not that I think the first name ceased:" per Holt, C.J., *Holman* v. *Walden* (1703), Holt, 492; 1 Salk. 6; S. C. *sub nom. Walden* v. *Holman*, 6 Mod. 115.

Name by repute.

"Yet there may be cases where names acquired by use and habit may be taken by repute as the true christian and surname of the parties:" per Sir W. Scott, *Frankland* v. *Nicholson* (1805), 3 M. & S. 259, n. at p. 260.

"If the person be so described that he may be certainly known from other persons, the omission, or in some case the misprision, of the name of baptism, shall not avoid the grant; as a gift, '*omnibus filiis J. S.*,' or '*primogenito filio J. S.*,' or '*uxori de J. S.*,' or '*filiae de J. S.*,' when there is but one. The name of baptism of the Abbot of W. was *Richerus*, and he by the name of *Richardus*, Abbot de W., made a grant; and although his name of baptism was mistaken, yet because the other words, *sc.* '*Abbas de W.*,' did certainly describe the person, for his cause the grant, notwithstanding the misprision of

Mistake in name.

Name by description.

the name of baptism, was good. So, if a grant be made to J. S. *et Margaretae uxori suae* where the wife's name is *Margeriae* or to J. S. *et Mariottae uxori suae* where the wife's name is Marion, yet the grant is good, although the name of baptism be mistaken, because *uxori suae* is a certain description of the person:" *Dr. Ayray's Case* (1613), 11 Rep. 18 b at p. 21 a.

Where articles of association authorised the nomination by the ordinary form of a proxy. *Held*, that the nomination of any person who might be a partner in a certain firm was sufficient, and that a person who was a partner, when the vote was given, but was not a partner when the proxy was signed, could act under the nomination: *Bombay Burmah Trading Corporation* v. *Dorabji Cursetji Shroff*, [1905] A. C. 213.

Change of surname.

A man may change his name, *i.e.*, his surname, as often as he likes, no fraud being intended: per Tindal, C.J., *Davies* v. *Lowndes* (1835), 2 Scott, 71 at p. 103; 1 Bing. N. C., 597 at p. 618. See also *Leigh* v. *Leigh* (1808), 15 Ves. 92 at p. 100; *Doe* d. *Luscombe* v. *Yates* (1822), 5 B. & Ald. 544; *Re James* (1850), 5 Ex. 310; *Re Dearden* (1850), 5 Ex. 740; *Re Gimlet* (1863), 11 W. R. 210. And it is not necessary that he should obtain an Act of Parliament or a royal licence, or execute a deed poll, or issue advertisements, for a surname may be acquired by assumption and reputation only, which are matters of fact to be proved by evidence: *Re Croxon*, [1904] 1 Ch. 252.

But where a testator bequeathed a legacy to an infant spinster in case she should marry "any person of the surname of Barlow;" and she married a man whose father's name was Bateman, but who, prior to the marriage, assumed the name of Barlow for the purpose of complying with the will. *Held*, in Dom. Proc. reversing Jekyll, M.R., that the legatee had not complied with the condition, and she and her husband were not entitled to the legacy: *Barlow* v. *Bateman* (1735), 2 Bro. P. C. 272.

Divorced woman.

"Marriage confers a name upon a woman which becomes her actual name, and she can only attain another by reputation:" per Hannen, P.: *Fendall* v. *Goldsmid* (1877), 2 P. D. 263 at p. 264; and when a commoner who has married and divorced a peer marries another commoner, she cannot be restrained by the peer from using the title, though she has no legal right thereto: *Cowley* v. *Cowley*, [1900] P. 305; [1901] A. C. 450.

Party described by incorrect name.

Where a person is described in a deed, and executes it, by the name by which he usually passes, which is not his correct name, the deed will be upheld on evidence of identity being given: *Gould*

v. *Barnes* (1811), 3 Taunt. 504; *Shaw* v. *Hunt* (1818), 8 Taunt. 645; *Addis* v. *Power* (1831), 7 Bing. 455; *Williams* v. *Bryant* (1839), 5 M. & W. 447. And a marriage after banns in which the usual though not the baptismal name of the husband was given, was held good: *Rex* v. *Billinghurst* (1814), 3 M. & S. 250.

Where a man was called by an incorrect name throughout a deed, but executed it by his correct name, the deed was upheld as his deed: *Janes* v. *Whitbread* (1851), 11 C. B. 406, 413. See Viner, Abr. tit. Faits, B.

Where a firm is made a party to a deed, evidence is admissible to show who in fact constituted the firm at that time: Lindley on Partnership, Bk. I. c. 7, s. 2 (7th ed. p. 129); *Carruthers* v. *Sheddon* (1815), 6 Taunt. 14; *Maugham* v. *Sharpe* (1864), 17 C. B. N. S. 443; 34 L. J. N. S. C. P. 19. Firm.

A conveyance was made to "Wm. Wray"; in fact, that was the name under which four persons carried on business in partnership, one of whom, with the concurrence of the others, signed the name Wm. Wray on the conveyance. *Held*, that the legal estate passed to the four partners as joint tenants: *Wray* v. *Wray*, [1905] 2 Ch. 349.

The individuals composing a class which is capable of being ascertained may be made parties by the name of that class, as "all a man's creditors:" *Gresty* v. *Gibson* (1866), L. R. 1 Ex. 112; *Reeves* v. *Watts* (1866), L. R. 1 Q. B. 412; *M'Laren* v. *Baxter* (1867), L. R. 2 C. P. 559; *Isaacs* v. *Green* (1867), L. R. 2 Ex. 352. Class.

Though a corporation should be described by its proper name, *i.e.*, by the name by which it was incorporated, it is sufficient to use such name as will identify it: *Dr. Ayray's Case* (1613), 11 Rep. 18 b; *The Dutch West India Co.* v. *Van Moses* (1725), 1 Stra. 612; S. C. on appeal, *sub nom. Henriques* v. *General &c. to West Indies* (1728), 2 Ld. Raym. 1532; *Croydon Hospital* v. *Farley* (1816), 6 Taunt. 467; Grant on Corporations, pp. 50 *et seq.* See also, on the question what variances from the true name of the corporation are material: *The Case of the Corporation of the Cathedral Church of Carlisle* (1568), Dy. 278; *Croft* v. *Howel* (1577), Plowd. 536 a; *Fanshawe's Case* (1587), Moore, 228; S. C. *sub nom. Mariot* v. *Mascal*, 1 Anders. 202; on appeal, *sub nom. Marriot* v. *Pascall* (1588), 1 Leon. 159; *Button* v. *Wrightman* (1593), Poph. 56; *Pits* v. *James* (1614), Hob. 121; *Butler* v. *Fincher* (1615), 1 Roll. Rep. 229; 2 Bulstr. 302. Corporation.

The King incorporated a borough by the name of the Mayor and

Burgesses of his borough of Lynne Regis, commonly called King's Lynne; a person became bound to the corporation in a bond by the name of the Mayor and Burgesses of Lynne Regis. *Held*, that the bond was good. The name of a corporation in grants or conveyances need not be *idem syllabis seu verbis;* it is sufficient if it be *idem re et sensu: Mayor and Burgesses of Lynne Regis' Case*, 10 Rep. 122 b.

False description of party.

A false description of a party will not vitiate the deed, where it is clear what person is meant.

Conveyance made to Rodolf Evers, Knight, Lord Evers. *Held*, that the conveyance was good, though at the time it was made he was not a knight nor reputed to be a knight: *Evers* v. *Strickland* (1610), 1 Bulstr. 21; though it has been said that a grant to a knight by the name of Esq., and *vice versâ*, is void: *Rex* v. *Bishop of Chester* (1697), 1 Ld. Raym. 292 at p. 303; Carth. 440.

Bastard.

A bastard can be made a party by his name of reputation: Co. Litt. 3 b; and he may be described as the "son" of his reputed father when he has acquired the reputation of being so: *Finch's Case* (1606), 6 Rep. 63 a at p. 65 a.

Reputed wife.

Where a woman who had gone through the ceremony of marriage which was afterwards discovered to be invalid, executed a deed by the description of "Eliza, the wife of" the reputed husband, the description was held sufficient: *Boughton* v. *Sandilands* (1811), 3 Taunt. 342.

See further as to parties, names, and descriptions, Cruise, Dig. tit. xxxii., Deed, c. 21, ss. 7 *et seq.;* 3 Dav. Prec. 357, note (*m*); Elph. Introd. Conv. (5th ed.), pp. 52 *et seq.*

CHAPTER XI.

RECITALS.

Variance between Recitals and Operative Part: General and Specific Descriptions: Releases: Misrecitals: Estoppel by Recital: Recital Creating Covenant: Recital Executing Power.

MANY deeds, particularly modern deeds, have recitals, and it sometimes happens that the recitals are not consistent with the operative part. When this is the case—

Operative part, if clear, not controlled by recitals.

If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

"If the recitals are ambiguous and the operative part is clear, the operative part must prevail:" per Ld. Esher, M.R., *Ex parte Dawes* (1886), 17 Q. B. D. 275 at p. 286.

Specific description in operative part not controlled by general description in recitals.

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the operative part will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals.

"The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth, and that is plain and full, without any manner of contradiction whatsoever:" per Holt, C.J., *Bath and Mountague's Case* (1693), 3 Ca. Ch. 55 at p. 101.

"Where the operative part of the deed uses language which admits of no doubt it cannot be controlled by the recital:" per Leach, M.R., *Bailey* v. *Lloyd* (1829), 5 Russ. 330 at p. 344.

"When the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed:" per Patteson, J., *Walsh* v. *Trevanion* (1850), 15 Q. B. 733 at p. 751; 19 L. J. Q. B. 458 at p. 462; 14 Jur. 1134 at p. 1136.

"It is impossible by a recital to cut down the plain effect of the operative part of a deed:" per Romilly, M.R., *Holliday* v. *Overton* (1852), 14 Beav. 467 at p. 470.

"It is of the greatest consequence to keep distinct the different parts of deeds, and to give to recitals and to the operative part their proper effects. I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious, and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities:" per Romilly, M.R., *Young* v. *Smith* (1865), L. R. 1 Eq. 180 at p. 183; 35 Beav. 87 at p. 90; 11 Jur. N. S. 963.

"I am not aware of any authority in which a clear, precise, and specific description of property in the operative part of a deed has been controlled at law by the effect of mere recitals, or by inference from the covenants or subsequent parts of the deed:" per Jessel, M.R., *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378 at p. 394.

"If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or deed:" per Brett, L.J., *Leggott* v. *Barrett* (1880), 15 Ch. D. 306 at p. 311.

"The rule is that a recital does not control the operative part of a deed where the operative part is clear:" per Jessel, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354 at p. 358.

Examples.

Bond.

Where the condition of an indemnity bond, after referring to the recited transactions, continued, "or on any other account thereafter to subsist between" the debtor and the plaintiff, it was held that the extent of the condition was not restrained by the recitals: *Sansom* v. *Bell* (1809), 2 Camp. 39.

Where a bond was taken in the penalty of 1,000*l.*, *Held* that the penalty could not be cut down to 500*l.* by a recital that the parties had agreed to execute a bond for that amount: *Ingleby* v. *Swift* (1833), 10 Bing. 84; 3 Moo. & Sc. 488.

Bond securing repayment of the balance of an account current, reciting a desire for advances over and above an amount of 2,500*l.*

already secured by a guarantee, which was subsequently held to be invalid: *Held* that the bond could not be limited to moneys in excess of the 2,500*l.*: *Australian Joint Stock Bk., Ld.* v. *Bailey*, [1899] A. C. 396.

Covenant.

If a deed contain an absolute covenant not to do a certain act, such covenant will not be controlled by a recital that the parties intended that, on the payment of a sum of money for liquidated damages, it might be done: *Bird* v. *Lake* (1863), 1 H. & M. 111.

And a covenant for title is not limited by the fact that the defect in the title appears in the recitals: *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11.

Parcels.

Two partners, to secure a partnership debt, conveyed certain joint property particularly described in the deed, "and all other the hereditaments of them, or *either of them*, situate *elsewhere* in the town of M.," but the recitals, covenants, and provisions in the deed, related solely to the joint property. *Held*, that the deed extended to a separate estate of one of the partners situate in M.: *Ex parte Young* (1839), 4 Deac. 185.

By articles, reciting that A. had agreed to give a mortgage of "his *freehold* estates at I., *subject to the charge affecting the same*," A. agreed to execute a mortgage of "all his lands, tenements, and hereditaments, at or near I. aforesaid." *Held*, that copyhold property and also freehold property, not subject to the charge, were subject to the agreement: *Ex parte Glyn* (1840), 1 M. D. & De Gex, 29.

A marriage settlement contained a recital of an agreement to settle a certain estate "except the town and lands of B. and its sub-denominations." The operative part conveyed, *inter alia*, K., which was one of the sub-denominations of B. *Held*, that it passed: *Alexander* v. *Crosbie* (1835), Ll. & Goo. *temp.* Sugden, 145; see per Sugden, C. at p. 152.

Transfer of mortgage.

Transfer of a mortgage, containing a recital that "in the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised," followed by assignment of the moneys due on the mortgage, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained." *Held*, that the power of sale in the recited mortgage was capable of being exercised: *Boyd* v. *Petrie* (1872), L. R. 7 Ch. 385.

Settlement.

A power of appointment by the wife during the intended

coverture was held not to be extended, so as to be exercisable after the coverture, by a recital that the provision intended to be made should be subject to "a power of appointment by will:" *Holliday* v. *Overton* (1852), 14 Beav. 467.

A recital in a marriage settlement that it had been agreed that the husband should enter into the covenant to assign all the interest that the wife might have under the wills or otherwise of two named persons then deceased thereinafter contained, was followed by a covenant by the husband to assign all the interest of the wife under the wills of the two testators or otherwise howsoever. Afterwards the wife became entitled to an unappointed share under the marriage settlement of one of the testators. *Held*, that such share was clearly included in the covenant, which could not be cut down by the recital: *In re Owen's Trust* (1855), 1 Jur. N. S. 1069.

Covenant to settle.

A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was by the husband alone. *Held*, that the wife was not bound: *Hammond* v. *Hammond* (1854), 19 Beav. 29; *Young* v. *Smith* (1865), 35 Beav. 87; L. R. 1 Eq. 180; *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354. And conversely, where the recital was of an agreement that the husband should covenant to settle the after-acquired property of the wife, followed in the operative part by an agreement by all parties and a covenant by the husband to settle it. *Held*, that property afterwards given to the separate use of the wife was bound: *Willoughby* v. *Middleton* (1862), 2 J. & H. 344.

Settlement reciting agreement to settle five distinct denominations of lands, specifically described; grant to trustees of three only of the denominations. *Held*, that the omitted denominations were not bound by the trusts of the settlement: *Macnamara* v. *Carey* (1867), 1 Ir. Rep. Eq. 9.

Private statute.

A private statute, after reciting that it would be for the advantage of the tenant for life and remainderman that certain settled lands should be sold, enacted that the parcels described in the second schedule should be vested in trustees for sale. Certain lands not comprised in the settlement were included. *Held*, that the enacting words being precise and specific could not be limited by the recitals: *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378.

The case of *Ashwell* v. *Staunton* (1861), 30 Beav. 52, where a mortgage recited an agreement to pay the debt with interest, but the proviso for redemption, the covenant to pay and the trusts of the proceeds of sale made no mention of interest; and it was held

that interest was payable, is no exception to the rule, as the case was decided on the principle that money payable on a day certain carries interest.

Recital of agreement for sale followed by receipt for purchase money.

The rule must be applied with some caution, for, bearing in mind that an agreement for the sale of property, accompanied by the payment of the purchase money, operates as a conveyance in equity, it appears that a recital of an agreement for the sale of Blackacre and Whiteacre for a certain sum, followed by a conveyance, "in pursuance of the recited agreement and in consideration of the said sum of £—— (the receipt, &c.)," of Blackacre only, will operate in equity as a conveyance of Whiteacre also. But a recital of an agreement for the sale of Blackacre for a certain sum, followed by a conveyance of Blackacre and Whiteacre for that sum, appears to fall within the rule.

Ambiguous operative part controlled by clear recitals.

> "If the recitals are clear and the operative part of a deed is ambiguous, the recitals govern the construction:" per Lord Esher, M.R., *Ex parte Dawes* (1886), 17 Q. B. D. 275 at p. 286.

Specific statement in recitals not enlarged by general statement in operative part.

> It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the recitals, will not be enlarged by a general description, or a general or ambiguous statement, contained in the operative part. See Dart, V. & P. c. 11, s. 3 (7th ed., p. 548); 1 Dav. Prec. (5th ed.), p. 41; Burton, Comp. s. 530.

"If the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties:" per Leach, M.R., *Bailey* v. *Lloyd* (1829), 5 Russ. 330 at p. 344.

"On the other hand, when those words" (*sc.* the words in the operative part of a deed) "are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties and to fix the true meaning of those words:" per Patteson, J., in *Walsh* v. *Trevanion* (1850), 15 Q. B. 733 at p. 751; 19 L. J. Q. B. 458 at p. 462; 14 Jur. 1134 at p. 1136.

"As to the construction of the settlement, I do not dispute the proposition which was argued, that if you find in a settlement recitals indicating various parcels enumerated, from whence it is to

be inferred, from reading the recital alone, that these parcels, and these alone, are to be included in and made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted (see *Macnamara* v. *Carey* (1867), 1 Ir. Eq. Rep. 9), the Court may be of opinion, upon the construction of the deed, that the parcels which are omitted in the operative part are omitted by mistake, and are not included in the provisions of the deed (*sic ; sed quaere*, are omitted and are not included, &c., by mistake). And the converse of that proposition is also true: parcels may be included in the operative part of the deed which the recitals and the rest of the deed show to have been inserted there by mistake. There are several cases to that effect, and amongst them the well-known case, before Lord Mansfield, of *Moore* v. *Magrath* ((1774), 1 Cowp. 9): " per Romilly, M.R., *Barratt* v. *Wyatt* (1862), 30 Beav. 442 at p. 443; 31 L. J. Ch. 652 ; 6 L. T. N. S. 801.

" Where the recital is that you intend to convey certain specific property, and the general words in the habendum, including 'interest,' and the like, are sufficiently large to carry other property which is not specified, and is distinct from that which is specified, in the recital, that other property does not pass: " per Lord Romilly, M.R., *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91 at p. 97.

" Though the words used might by themselves be capable of a different meaning, we may call in aid the recitals to explain them. . . . The right course then is not to reform or correct the instrument, but to construe it by the light of the recitals: " per Channell, B., *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209 at p. 219.

" Nothing I consider is better settled than that these general words, even where they would pass the land *ex vi terminorum*, are restricted by the recitals and what is called the scope of the instrument. . . . The principle is, that though words of specific description are not easily dealt with, yet general words are; and that though general words may be in themselves large enough, . . . yet if, upon the whole scope of the instrument, as to which especial regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass those properties, it will not pass them: " per Jessel, M.R., *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378 at p. 391.

" Another thing which I think we may consider settled by authority is that where the words of a covenant are ambiguous

and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning:" per Jessel, M.R., *Re Michell's Trusts* (1878), 9 Ch. D. 5 at p. 9.

"Where the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument. Where those words are susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning. In order to justify a reference to the context for this purpose, it is not necessary that the language of the dispositive or operative clause should be ambiguous in the sense that without some help you cannot tell which of two meanings should be taken. The rule applies though one of the two meanings is the more obvious, and would necessarily be preferred if no light could be derived from the rest of the deed. For the purpose of construing the dispositive or operative clause the whole of the instrument may be referred to, though the introductory narrative or recitals leading up to that clause are perhaps more likely to furnish the key to its true construction than the subsidiary clauses of the deed:" per Lord Macnaghten, *Orr* v. *Mitchell*, [1893] A. C. 238 at p. 254.

Examples. Covenant.

Where the operative part of a deed (which was not by way of present conveyance but of covenant) appeared to have been intended to follow, but did not accurately follow, the words of a recital, the effect of the operative part was limited to the extent pointed out by the recital: *Re Neal's Trusts* (1857), 4 Jur. N. S. 6.

A deed poll, reciting the conveyance of land in consideration of an annual rent to be paid to the vendor or the person to whom the inheritance of the premises conveyed should for the time being belong in case the said conveyance had not been made, contained a covenant with the vendor and with the person to whom the inheritance of the conveyed premises "shall for the time being belong" to pay the rent. *Held*, that the terms of the deed poll were explained by the recitals and also by a later deed: *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209.

A recital in a transfer of mortgage that the transferees, who were a solicitor and a surveyor, "should be entitled to make the same charges and to receive the same remuneration respectively for all business done by them respectively in or about these presents" as if they had not been mortgagees, was followed by a covenant by the mortgagor to pay the principal and interest and "every other sum which may hereafter be advanced or paid by the transferees or

either of them to or become owing to them or him by" the mortgagor. *Held*, that the latter words were limited by the recitals to moneys owing in respect of the mortgage: *Field* v. *Hopkins* (1890), 44 Ch. D. 524.

Parcels.

In a case where there were no recitals the settlor, in consideration of love and affection, and for settling the one undivided moieties of the hereditaments thereinafter mentioned, granted the one undivided moieties of all those manors, &c., following, describing them, together with all other the settlor's lands, tenements and hereditaments in Ireland, habendum the said undivided moieties with their appurtenances, together with all other the settlor's estate in Ireland, unto uses thereinafter declared, but uses were declared of the moieties only. *Held*, that no part of the settlor's other estates in Ireland passed: *Moore* v. *Magrath* (1774), 1 Cowp. 9; Lofft, 398.

A settlor entitled to a mansion, thirteen fields and mills, recited his intention to settle "the property thereinafter particularly mentioned," and settled the mansion house and eight fields, all of which were particularly described in the parcels following, with general words wide enough to pass the other five fields. *Held*, that, having regard to the recitals and the particularity of the parcels, the general words did not pass the other five fields: *Doe* d. *Meyrick* v. *Meyrick* (1832), 2 Cr. & J. 223.

Lease, reciting former demise of the parcels, described as "fifty-nine acres provincial measure;" and an intention to demise the "said estate," demised "the same being forty-five acres statute measure." *Held*, that the soil of a road which had been made and set out between the times of making the leases, and was part of the parcels comprised in the first lease, passed by the second: *Doe* d. *White* v. *Osborne* (1840), 4 Jur. 941.

"All that the one equal eighth part or share, or other the part or share, parts or shares, &c.," restricted by the recitals to one eighth share: *Gray* v. *Earl of Limerick* (1848), 2 De G. & Sm. 370.

Conveyance of "all the lands, &c., of A. and B., situate in" eight parishes (naming them) "and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained;" restricted by the recitals to the property comprised in the schedule: *Walsh* v. *Trevanion* (1850), 15 Q. B. 733; 19 L. J. Q. B. 458; 14 Jur. 1134.

Recital that by virtue of certain deeds, certain specified hereditaments, "and all other the hereditaments in the county of Y. hereinafter expressed to be appointed and released," stood limited as settlor

should appoint, and subject thereto to him in fee; and of an agreement for the settlement of the estates in the county of Y., "hereinafter mentioned and intended to be hereby conveyed," followed by an appointment and conveyance of the specified hereditaments mentioned in the recital, and "all other the hereditaments in the county of Y., of or to which the grantor was seised or entitled for an estate of inheritance." *Held*, that an estate in the county of Y., of which the grantor was seised, but which was not specifically mentioned in the recited deeds or the parcels in the conveyance, did not pass: *Jenner* v. *Jenner* (1866), L. R. 1 Eq. 361.

Private statute.

A private statute recited that it would be greatly for the benefit of the tenant for life and remaindermen if certain lands comprised in a settlement and a previous statute were sold, and enacted that all the hereditaments settled by the settlement and previous statute which were described in the schedule, with the usual "general words," should be vested in trustees for sale. Certain hereditaments not comprised in the settlement and previous statute were included in the schedule. *Held*, that, having regard to the recitals and the description in the parcels, such hereditaments did not pass by the statute: *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378.

Composition deed.

A composition deed contained a recital of an agreement to assign all the property set forth in the schedule, and the debtor assigned all the properties, &c., set forth in the schedule and all other the estate, if any, of the debtor. *Held*, that the general words were controlled by the recital, and that the debtor's life interest under a post-nuptial settlement, which was not included in the schedule, did not pass: *Ex parte Dawes* (1886), 17 Q. B. D. 275.

Mines.

A conveyance in Scotland "of all and whole the lands" was held by reference to the recitals not to include the minerals: *Orr* v. *Mitchell*, [1893] A. C. 238.

Settlement.

Settlement, reciting an agreement that a moiety of all such property as A. B. should at any time during the coverture be or become seised or possessed of, or interested in or entitled unto, should be settled: A. B. covenanted that in case any lands should at any time during the coverture accrue unto or vest in him upon the death or by the settlement or devise of any person, he should convey one moiety to the trustee. *Held*, that land of which A. B. was tenant in tail in remainder subject to the life interest of his father, but defeasible by his father making an appointment, was subject to the covenant: *Maclurcan* v. *Lane* (1858), 7 W. R. 135; 5 Jur. N. S. 56; 32 L. T. O. S. 172.

By a settlement, made in 1826, 20,000*l.* was settled in trust for a woman for life, with remainder for her children as she should appoint, and in default for them equally, the shares of sons to vest at twenty-one, of daughters at twenty-one or marriage; there were two children, a son and a daughter: the mother appointed 10,000*l.* to the son on his marriage: the settlement made on his marriage in 1850, recited that he was entitled to 10,000*l.*, and also entitled to the rest of the fund contingently on the death of his sister under twenty-one unmarried, subject and without prejudice to the trusts of the settlement of 1826, and an agreement to settle the 10,000*l.* and "all other his part, share, and interest, as well vested as contingent" in the trust funds. The son then assigned his interest in the same terms. The daughter attained twenty-one and died, and the mother appointed the residue of the funds to her son. *Held*, that it did not pass under the settlement: *Childers* v. *Eardley* (1860), 28 Beav. 648.

Covenant to settle.

A covenant for the settlement of the wife's after acquired property was construed by reference to the recitals in *In re Michell's Trusts* (1878), 9 Ch. D. 5; *In re De Ros' Trust* (1885), 31 Ch. D. 81; and *In re Coghlan*, [1894] 3 Ch. 76.

Omission of name from operative part.

Where a deed, to which a married woman was a party, and which was acknowledged by her, contained recitals of an agreement for the sale of lands in which her husband was interested, free from incumbrances; and that she and her husband had agreed to join in the same for the purposes thereinafter mentioned; but her name was omitted throughout the operative part and the covenants for title. *Held*, that her dower was barred, reliance being placed on the fact that if the wife's dower was not bound, she would have executed a deed in the most solemn manner known to the law and have passed nothing by it: *Dart* v. *Clayton* (1864), 4 N. R. 221; S. C. *sub nom. Dent* v. *Clayton*, 33 L. J. N. S. Ch. 503; 10 Jur. N. S. 671; 12 W. R. 903.

Appointment of new trustees.

Conveyance by retiring, to new, trustee of specific parcels, "and all other monies, securities, property, and effects, now vested jointly in the retiring and continuing trustee." *Held*, on consideration of the recitals, the witnessing part, the state of the property, and mode of dealing with it, not to pass leaseholds not specifically mentioned: *Hopkinson* v. *Lusk* (1864), 34 Beav. 215; 10 Jur. N. S. 288.

Power of attorney.

Power of attorney appointing attorneys without in terms limiting the duration of their powers, but with recitals that principal was going abroad, and was desirous of appointing attorneys during his

absence. *Held*, to be an appointment of attorneys only during such absence: *Danby* v. *Coutts* (1885), 29 Ch. D. 500.

Covenants apparently dependent shown by recitals to be independent: *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192.

Covenants apparently dependent.

Bond for the good behaviour of A. "so long as he shall continue deputy-postmaster," with a recital that he had been appointed for six months. *Held*, that the bond was restricted to his behaviour during the six months: *Lord Arlington* v. *Merricke* (1671), 2 Wms. Saund. 411 (p. 813, ed. 1871); 3 Keb. 45 and 59.

Bond.

The recital of an appointment to an office for twelve months was held sufficient to cut down words in the condition which were wide enough to include transactions arising after the twelve months had expired: *Liverpool Waterworks Co.* v. *Atkinson* (1805), 6 East, 507.

So where the office was in fact an annual office, though not recited to be so, the surety was not bound on subsequent appointments of the same officer: *Wardens of St. Saviour's* v. *Bostock* (1806), 2 B. & P. N. R. 175; *Hassell* v. *Long* (1814), 2 M. & S. 363; *Peppin* v. *Cooper* (1819), 2 B. & Ald. 431; *Leadley* v. *Evans* (1824), 2 Bing. 32; 9 J. B. Moore, 102; *Kitson* v. *Julian* (1855), 4 E. & B. 854; *Mayor of Cambridge* v. *Dennis* (1858), E. B. & E. 660.

So in fidelity bonds, where there was a recital of the nature of the service, the surety was discharged by an alteration in the service, though the words of the condition were wide enough to include the altered service, *e.g.*, by the alteration of remuneration from commission to a fixed salary: *Bamford* v. *Iles* (1849), 3 Exch. 380; or from a fixed salary to commission: *North-Western Ry. Co.* v. *Whinray* (1854), 10 Exch. 77; but not where there was a mere reduction in salary (it does not appear whether the amount of the salary was recited in the bond): *Frank* v. *Edwards* (1852), 8 Exch. 214.

Whether the subsequent promotion to be manager of a branch bank releases sureties under a bond which recited the appointment as a clerk and was conditioned for fidelity whilst in the service of the bank, *quaere*: *Anderson* v. *Thornton* (1842), 3 Q. B. 271; 2 G. & D. 502.

The extent of the condition in an indemnity bond was restricted to past transactions only by the recitals, though the words of the condition were wide enough to extend to future transactions also: *Pearsall* v. *Summersett* (1812), 4 Taunt. 593.

Other instances of the statements in the operative part being controlled by the recitals are: *Cholmondeley* v. *Clinton* (1817–21), 2 J. & W. 1; 2 Mer. 171; 4 Bligh, 1; 2 B. & Ald. 625 (limitations

Miscellaneous.

explained); *Lampon* v. *Corke* (1822), 5 B. & Ald. 606; S. C. *sub nom. Lambourne* v. *Cork*, 1 D. & Ry. 211 (receipt qualified, this case was discussed and followed in *Bottrell* v. *Summers* (1828), 2 Y. & J. 407); *Denison* v. *Holiday* (1857), 1 H. & N. 631; (1858) 3 H. & N. 670 (parcels restricted); *Re Daniel* (1875), 1 Ch. D. 375, (where the construction of the usual trusts for children in a settlement in which the trusts for daughters were omitted, was aided by a recital of an intention to provide for "children").

Releases always restricted to matters mentioned in the recitals.

The most striking instance of the generality of the operative words being controlled by the recitals occurs in a release.

"If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited which was under the contemplation of the parties, and intended to be released:" per Lord Hardwicke, C., *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 305 at p. 310.

"If there be introductory matter, that will qualify the general words of the release:" per Best, J., *Lampon* v. *Corke* (1822), 5 B. & Ald. 606 at p. 611; S. C. *sub nom. Lambourne* v. *Cork*, 1 D. & Ry. 211.

"The general words of a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given:" per Lord Westbury, *L. & S. W. Ry. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610 at p. 623. And see Dav. Prec. vol. 5, pt. 2, p. 147 (3rd ed.); n. (*f*) to *Fowell* v. *Forrest* (1670), 2 Wms. Saund. 47 (p. 141, ed. 1871).

Cases in which general words of release have been restricted by recitals are: *Anon.* (1607), 2 Roll. Ab. 409, A. pl. 3; *Knight* v. *Cole* (1690–1), 3 Lev. 273; 1 Show. K. B. 150; Carth. 118; S. C. *sub nom. Cole* v. *Knight*, 3 Mod. 277; Holt, 620; *Thorpe* v. *Thorpe* (1698–1701), 1 Ld. Raym. 235, 662; *Butcher* v. *Butcher* (1804), 1 B. & P. N. R. 113; *Payler* v. *Homersham* (1815), 4 M. & S. 423; *Upton* v. *Upton* (1832), 1 Dowl. 400; *Simons* v. *Johnson* (1832), 3 B. & Ad. 175; *Lindo* v. *Lindo* (1839), 1 Beav. 496; *Bain* v. *Cooper* (1842), 9 M. & W. 701; *Major* v. *Salisbury* (1845), 2 D. & L. 763; 14 L. J. Q. B. 118; *Anon.* (1862), 31 Beav. 310; *London and South Western Ry. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610; 39 L. J. Ch. 713 (the recitals are set out in the report of the

case in the Court below, 38 L. J. Ch. 19); *Turner* v. *Turner* (1880), 14 Ch. D. 829.

Releases without recitals.

In the following cases the general words in the release were limited to the matters which the parties had in contemplation, though they were not mentioned in the recitals: *Henn* v. *Hanson* (1663), 1 Lev. 99; 1 Sidf. 141; *Stokes* v. *Stokes* (1669), 1 Lev. 272; 2 Keb. 530; S. C. *sub nom. Nokes* v. ——, 1 Vent. 35; *Morris* v. *Wilford* (1677–9), 2 Lev. 214 (where the marginal note appears to be incorrect); 3 Keb. 814, 840; 2 Show. 46; Sir T. Jones, 104; *Farewell* v. *Coker* (1725–9), 2 Ja. & W. 192; stated by Grant, M.R., in *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171 at p. 353; *Lyall* v. *Edwards* (1861), 6 H. & N. 337; *Turner* v. *Turner* (1880), 14 Ch. D. 829.

Recital of objections to the title.

It appears that if, for the purpose of obviating objections to a title, a person joins in the conveyance, which recites specified objections, he is not bound, except as to the interest appearing by the objections to be vested in him; but that, if the recital is generally that there are objections to the title, without stating what they are, it must be taken that he has inquired into the nature of such objections, and he cannot afterwards raise any question as to the extent of his information, so that every interest that he has is bound: *Lord Braybroke* v. *Inskip* (1803), 8 Ves. 417; cited and followed by Sir Wm. Grant, M.R., in *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171 at p. 355; Dart, V. & P. c. 11, s. 3, p. 550 (7th ed.).

Misrecitals are immaterial.

A misrecital will not affect the deed, if it be sufficiently clear what is intended.

Misrecital of lease.

A misrecital of a lease in a grant of the reversion does not invalidate the grant: *Withes* v. *Casson* (1614), Hob. 128; *Foote* v. *Berkly* (1668–70), 2 Keb. 322, 480, 611, 654; 1 Lev. 234; 1 Vent. 83.

of fine,

Grant of a manor held good, though in reciting a fine which formed part of the title, the names of the plaintiffs and deforciants were transposed, "for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it," the rest of the description of the fine being correct: *Moody* v. *Lewen* (1593), Cro. Eliz. 127; S. C. more fully reported *sub nom. Lewen and Mody's Case*, 3 Leon. 135.

in grant of reversionary lease.

Where, on the grant of a reversionary lease, an existing lease to A. is recited, and the date is incorrectly stated, it appears that, if the habendum is made from and after "the *said* lease," or "the

expiration, surrender, or forfeiture of the *said* lease," the term commences immediately; but, if the habendum is "from and after the lease to A." or "after A.'s interest determined," the term commences on the expiration of A.'s lease: see Co. Litt. 46 b, note 10; *Mount* v. *Hodgkin* (1555), Dy. 116 a; 1 And. 3; Benl. & Dal. 38; Bendl. 35; *Foote* v. *Berkly* (1668–70), 1 Lev. 234; 1 Vent. 83; 2 Keb. 322, 480, 611, 654; and see Platt on Leases, vol. 2, pp. 63, 69, and cases there cited; Shep. Touch. 77. The reason apparently is, that in the former case the term is made to commence on the determination of a term which does not exist, in the latter case on the determination of a term which, though not described by the deed, can be ascertained by extrinsic evidence. If the existing lease to A. is void, the term commences immediately: Bro. Leases, 62; *Anon.* (1576), 2 Leon. 11; *Miller* v. *Mainwaring* (1604), W. Jo. 354; Cro. Car. 397.

Misrecitals cannot be corrected.

Misrecitals cannot be corrected by reference to the recited document: *Lainson* v. *Tremere* (1834), 1 Ad. & E. 792, where in an action on a bond conditioned for rent recited to be of a certain amount, defendant was not allowed to plead that, by the indenture referred to in the bond, a less rent was reserved which had been paid; *Re Carter's Trusts* (1869), Ir. R. 3 Eq. 495.

Misrecital influencing construction.

A misrecital may influence the construction.

Where the words of a recovery deed were in themselves sufficient to have passed an advowson appendant to a manor, yet, as it appeared from an erroneous recital that the parties believed it not to be appendant, it was held not to pass: *Moseley* v. *Motteux* (1842), 10 M. & W. 533.

Misrecital may operate by estoppel.

A misrecital may operate by way of estoppel.

This is contrary to the old doctrine, Co. Litt. 352 b, but is now settled law: 2 Sm. L. C. (11th ed.) 823 *et seq.*, notes to *Doe* d. *Christmas* v. *Oliver*, *The Duchess of Kingston's Case*, and *Trevivan* v. *Lawrence*; and *Hill* v. *Manchester Waterworks* (1831), 2 B. & Ad. 544; *Lainson* v. *Tremere* (1834), 1 Ad. & E. 792; 3 Nev. & M. 603; *Bowman* v. *Taylor* (1834), 2 Ad. & E. 278; 4 Nev. & M. 264; *Bowman* v. *Rostron* (1835), 2 Ad. & E. 295, subject to the following qualifications and remarks:—

Recital must be precise, not general.

(1) "That every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference."

"Every estoppell ought to be a precise affirmation of that which maketh the estoppell:" Co. Litt. 352 b. See also Sugd. V. & P. (14th ed.) 739, n.; 1 Dav. Conv. (5th ed.), p. 51; Dart, V. & P. (7th ed.), c. 13, s. 8, pp. 820, 821; 2 Sm. L. C. (11th ed.), p. 825, notes to *Doe* d. *Christmas* v. *Oliver*, *The Duchess of Kingston's Case* and *Trevivan* v. *Lawrence;* Bigelow on Estoppel (2nd ed.), c. 10, pp. 266 *et seq.; Salter* v. *Kidley* (1689), 1 Show. K. B. 58. "A general recital will not operate as an estoppel, but the recital of a particular fact will have that effect:" per Lord Lyndhurst, L.C., *Bensley* v. *Burdon* (1830), 8 L. J. O. S. Ch. 85 at p. 87. The recital must not be general in its terms, for "it is a rule that an estoppel should be certain to every intent:" per Lord Tenterden, C.J., *Right* v. *Bucknell* (1831), 2 B. & Ad. 278 at p. 281. It must be "a distinct statement of a particular fact:" per Parke, B., *Carpenter* v. *Buller* (1841), 8 M. & W. 209 at p. 212. There must be "a distinct averment of the grantor's title:" per Wood, V.-C., *Crofts* v. *Middleton* (1855), 2 K. & J. 194 at p. 204. "It may be that when a deed contains a recital of a particular fact in express terms, the effect of the recital cannot be got rid of by showing what the intention of the parties was. But when the language is general we may collect the intention from the terms of the whole deed:" per Channell, B., *South-Eastern Ry. Co.* v. *Warton* (1861), 6 H. & N. 520 at p. 528. The recital must be "precise and unambiguous:" per Lord Cairns, L.C., *Heath* v. *Crealock* (1874), L. R. 10 Ch. 22 at p. 30.

"There is not in this case that precise, clear, and unambiguous statement that Downs was seised in fee or had the legal estate which is required by the law;" and "it does not appear to me to be at all clear that that would amount to that precise averment of a fact which is necessary to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created:" per Jessel, M.R., *General Finance, &c. Co.* v. *Liberator Society* (1878), 10 Ch. D. 15 at p. 23; and see *Lovett* v. *Lovett*, [1898] 1 Ch. 82, and *In re Maddy's Estate*, [1901] 2 Ch. 820.

Recital must be of material fact.

(2) The recital must be of a material fact: see per Parke, B., *Carpenter* v. *Buller* (1841), 8 M. & W. 209 at p. 213; *Anon.* (1576), 2 Leon. 11; Co. Litt. 352 b, 4th rule.

Where the interest, whatever it might be, of a person in certain lands was conveyed to the grantee, "an erroneous recital of her earlier title does not preclude the grantee from showing what interest really passed by her grant:" *Trinidad Asphalte Company* v. *Coryat*, [1896] A. C. 587 at p. 593.

Estoppel only in action on the deed.

(3) "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital. . . . But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence:" per Parke, B., *Carpenter* v. *Buller* (1841), 8 M. &. W. 209 at pp. 212, 213.

"An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action there can be no estoppel:" per Wood, V.-C., *Carter* v. *Carter* (1857), 3 K. & J. 617 at p. 645; and see 2 Sm. L. C. (11th ed.) at p. 827; *Bittlestone* v. *Cooke* (1856), 6 E. & B. 296; *South-Eastern Ry. Co.* v. *Warton* (1861), 6 H. & N. 520, per Martin, B., at p. 527; *Fraser* v. *Pendlebury* (1861), 31 L. J. C. P. 1; 10 W. R. 104; *Ex parte Morgan* (1876), 2 Ch. D. 72.

Recitals are not general representations.

Recitals in a deed are not representations of fact, on the faith of which a stranger to the deed is entitled to act without enquiry: *Trinidad Asphalte Company* v. *Coryat*, [1896] A. C. 587. But in *Billson* v. *Crofts* (1873), L. R. 15 Eq. 314, where A., being entitled to a life interest determinable on insolvency, executed a composition deed which recited that he was then insolvent; this was held to estop him as plaintiff in a suit for a declaration that he had not forfeited his life interest by executing the deed.

Mistake prevents estoppel in equity.

(4) In equity a mistake of fact may be proved so as to prevent estoppel by recital: *Scholefield* v. *Lockwood* (1863), 33 L. J. Ch. 106; *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25; *Empson's Case* (1870), L. R. 9 Eq. 597.

Estoppel, how limited as to parties.

(5) It is a question of construction on the whole deed whether the language of a recital is to be taken as that of all parties or of some or one of them only, and the estoppel limited accordingly.

"When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in *Young* v. *Raincock* ((1849), 7 C. B. 310), and we have no doubt that the result of them is as above stated:" per Patteson, J., *Stroughill* v. *Buck* (1850), 14 Q. B. 781 at p. 787; 19 L. J. Q. B. 209 at p. 216. The real intention

and object of the admissions must be looked to: *South-Eastern Ry. Co.* v. *Warton* (1861), 6 H. & N. 520.

A bond recited that A. was seised in tail of an estate and had covenanted to suffer a recovery to the use of D. in fee, and the condition was that the bond should be void if the recovery should be suffered so that the estate should be vested in D. for ever. The recovery was suffered, but as A. had a life estate only, D. brought an action on the bond against one of the sureties. *Held*, that D. was not estopped by the recital from alleging that A. had only an estate for life: *Edwards* v. *Brown* (1829–31), 3 Y. & J. 423; 1 Cr. & J. 307.

Estoppel, when negatived by deed itself.

(6) Generally there is no estoppel if the allegation sought to be set up by estoppel is negatived on the face of the instrument itself: see Co. Litt. 352 b (8th rule), and 1 Dav. Conv. p. 51 (5th ed.). "Nor shall a man be estopped where the truth appears by the same instrument:" per Lord Tenterden, C.J., *Right* v. *Bucknell* (1831), 2 B. & Ad. 278 at p. 281; *Doe* d. *Lumley* v. *Scarborough* (1835), 4 Nev. & M. 724; 3 Ad. & E. 2. But this doctrine does not apply to cases in which, as in *Morton* v. *Woods* (1868), L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; 38 L. J. Q. B. 81, the existence of the relation of landlord and tenant is in question. "If any of the decisions or *dicta* were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of *Jolly* v. *Arbuthnot* ((1859), 4 De G. & J. 224):" per Kelly, C.B., *Ibid.* at p. 303 (L. J. p. 85).

Estoppel against married woman.

(7) *Semble*, there may be estoppel against a married woman: *Jones* v. *Frost* (1872), L. R. 7 Ch. 773; but she cannot by estoppel avoid a restraint on anticipation: *Lady Bateman* v. *Faber*, [1898] 1 Ch. 144.

Recitals in former deeds.

(8) A party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived: *Doe* d. *Shelton* v. *Shelton* (1835), 4 N. & M. 857; 3 Ad. & El. 265. In that case there was a conveyance of lands to A., reciting the bankruptcy of B. The deed was not executed by A. A. afterwards executed a settlement of the lands. Lord Denman, C.J., said: "Is it true as a general proposition that a party so claiming adopts the statement of facts in an anterior deed which goes to make up his title? We are aware of no authority for such a doctrine:" 4 N. & M. at p. 867; 3 Ad. & El. at p. 283.

On the other hand, in *Doe* d. *Gaisford* v. *Stone* (1846), 3 C. B. 196, a purchaser was held bound by a recital that estopped his vendor.

In *Melbourne Banking Corporation* v. *Brougham* (1882), 7 Ap. Ca. 307, the official assignee in insolvency of B. executed a release to mortgagees of the equity of redemption of an estate mortgaged by B. B. afterwards purchased from the assignee all the estate vested in him under the insolvency, and then instituted a suit to set aside the release on the ground of misrepresentation or mistake as to facts therein recited. It was held that the onus was upon B., who was *primâ facie* bound by the admissions under seal of his vendor, to prove the falsehood of the representations.

Person not executing deed.

(9) A party to a deed can obtain the benefit of an estoppel, though he did not execute it: *Hungerford* v. *Becher* (1855), 5 I. Ch. R. 417.

Doctrine not to be extended.

(10) Jessel, M.R., expressed a disinclination to extend the doctrine of estoppel by deed: *Gen. Finance, &c. Co.* v. *Liberator, &c. Society* (1878), 10 Ch. D. 15 at p. 24.

Recital may create covenant.

A recital in a deed may operate as a covenant, where it appears to have been the intention of the parties that it should so operate.

The authorities in support of this proposition are *Hollis* v. *Carr* (1676), Freem. Ch. 3; 2 Mod. 86; S. C. *sub nom. Holles* v. *Carr*, 3 Swanst. 638 at p. 648; *Iven* v. *Elwes* (1854), 3 Drew. 25; *Lay* v. *Mottram* (1865), 19 C. B. N. S. 479; *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265; *Buckland* v. *Buckland*, [1900] 2 Ch. 534.

An action may be maintained upon such implied covenant: *Saltoun* v. *Houstoun* (1824), 1 Bing. 433; *Sampson* v. *Easterby* (1829–30), 9 B. & C. 505; in error, 6 Bing. 644; 1 C. & J. 105; *Farrall* v. *Hilditch* (1859), 5 C. B. N. S. 840.

But not where covenant in deed.

But "the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter:" per Jessel, M.R., *Dawes* v. *Tredwell*, 18 Ch. D. 354 at p. 359.

Admission of a debt is a covenant to pay.

"The admission of a debt, as a general rule, by an instrument under seal would amount to a covenant to pay it, and the question was whether it had that effect in this deed. If it was a general and unqualified admission, that was the effect of it; but if the object was to acknowledge that debt merely as the ground of giving security of a particular character for it, then it was not the creation of a personal liability to pay, but was only introduced with the object of giving security:" per Malins, V.-C., *Jackson* v. *N. E. Ry. Co.* (1878), 7 Ch. D. 573 at p. 583, discussing *Courtney* v.

Taylor (1843), 7 Sc. N. R. 749; 6 Man. & G. 851, and other authorities. See also *Iven* v. *Elwes* (1854), 3 Drew. 25; S. C. *sub nom. Ivens* v. *Elwes*, 24 L. J. Ch. 249; 1 Jur. N. S. 6.

Power exercised by recital.

A recital in an instrument, capable of operating as the execution of a power may amount to an execution of the power: *Poulson* v. *Wellington* (1729), 2 P. Wms. 533; *Wilson* v. *Piggott* (1794), 2 Ves. Jr. 351, see p. 355; *In re Farnell's S. E.* (1886), 33 Ch. D. 599; even if the recital is only of a past transaction which by itself would not have been a sufficient execution of the power: *Lees* v. *Lees* (1871), I. R. 5 Eq. 549.

Recital only evidence of what is recited.

The recital of a former deed proves only so much of it as is stated in the recital: *Gillett* v. *Abbott* (1838), 7 A. & E. 783; 3 N. & P. 24; 1 W. W. & H. 91; 2 Jur. 300.

Miscellaneous.

Voluntary settlement of (*inter alia*) a sum of 2,000*l.* which was therein recited to have been paid to the trustee. The 2,000*l.* had not in fact been paid, but the trustee executed the settlement on the faith of a promise by the settlor to pay it. *Held*, that neither the trustee of the settlement nor a volunteer under it could enforce payment: *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8.

As to the effect of an ambiguous recital in connection with the doctrine of constructive notice, see *Kenny* v. *Browne* (1796), 3 Ridgway, 462 at p. 512; Dart (7th ed.), c. 14, s. 5, p. 895; as to a recital relieving a purchaser from ascertaining whether debts and legacies charged on the land had been paid, see *Storry* v. *Walsh* (1854), 18 Beav. 559; and as to a recital that the transferees of a mortgage were then entitled to the mortgage money, relieving a purchaser from enquiry how they became so entitled, see *Re Harman and Uxbridge & Rickmansworth Railway Co.* (1883), 24 Ch. D. 720.

CHAPTER XII.

CONSIDERATION—RECEIPT.

Illegal Consideration: Consideration may be proved: Post Nuptial Settlements of Wife's Property: Voluntary Assignments of Leaseholds: Consideration stated to have been paid by A. may be proved to have been paid by B.: Consideration necessary to raise Use: Receipt in Deed conclusive at Law prior to 1875: But not in Equity: Since 1875 not conclusive: Indorsed Receipt: Reliance on Receipt.

ALL the parts of a deed before the habendum are technically known as "the premises": Shep. Touch. p. 74; and in that part which follows after the recitals, if any, are usually contained the statement of the consideration and the receipt therefor.

If consideration illegal deed not enforceable,

If the consideration, or part of the consideration, for a deed is illegal the deed cannot be enforced.

The principal authorities for this proposition are *Featherston* v. *Hutchinson* (1590), 1 Cro. Eliz. 199; *Waite* v. *Jones* (1835), 1 Bing. N. C. 656 at p. 662, per Tindal, C.J.; *Shackell* v. *Rosier* (1836), 2 Bing. N. C. 634; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; [1892] 1 Ch. 173. But, although many statements to the effect that an illegal consideration avoids a deed will be found, a deed for an illegal, or partly illegal, consideration is not void in the sense that it is inoperative to pass the estate, though it may in certain circumstances be set aside and a reconveyance ordered: *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; [1892], 1 Ch. 173.

but deed is not void.

If consideration a nullity deed enforceable.

There is a distinction between a consideration which is illegal and one which is merely a nullity, for where a deed is made for a consideration, partly good and partly a nullity, the deed may be

enforced: *Crisp* v. *Gamel* (1606), Cro. Jac. 128; *Newman* v. *Newman* (1815), 4 M. & S. 66.

Proof of consideration not expressed in deed is admissible.

If the consideration is stated inaccurately, or is not stated at all, or if part only of the consideration is stated, evidence is admissible to prove the true consideration, so as it be not inconsistent with the consideration stated in the deed.

"An averment shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed, yet when the deed expresseth no consideration or saith 'for divers good considerations,' or the like, there an averment of a good consideration given shall be received, for this is an averment that may stand with the deed:" Shep. Touch. 510, and see 1 Dav. Prec. (5th ed.) 53.

"A use cannot be raised by any covenant or proviso or by bargain and sale, upon a general consideration; and therefore if a man by deed indented, and inrolled according to the statute, for divers good considerations, bargains and sells his lands to another and his heirs, *nihil operatur inde*, for no use shall be raised upon such general consideration, for it doth not appear to the Court that the bargainer hath *Quid pro quo*, and the Court ought to judge whether the consideration be sufficient or not; and that cannot be when it is alleged in such generality. But note, reader, the bargainee in such a case may aver that money or other valuable consideration was paid or given; and if the truth be such, the bargain and sale shall be good. So, if I by deed covenant with J. S., for divers good considerations, that I and my heirs will stand seised to the use of him and his heirs, no use, without a special averment, shall be raised by it; but if J. S. be of my blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof:" *Mildmay's Case* (1584), 1 Rep. 174 b at p. 176 a.

Bargain and sale.

Covenant to stand seised.

"That considerations, not recited in a deed, may be resorted to, to support it, is well settled provided they be not inconsistent with what appears upon the face of the deed:" per Plunket, C., *Nixon* v. *Hamilton* (1838), 2 Dr. & Wal. 364 at p. 385.

"The rule is that where there is one consideration stated in the deed, you may prove any other consideration, which existed, not in contradiction to the instrument:" per Knight-Bruce, V.-C., *Clifford* v. *Turrill* (1841), 1 Y. & C. C. C. 138 at p. 149.

"The settled rule of law is that you may go out of the deed to prove a consideration that stands well with that stated on the face of the deed, but you cannot be allowed to prove a consideration inconsistent with it:" per Lord Lyndhurst, C., *Clifford* v. *Turrill* (1845), 9 Jur. 633 (where the authorities are discussed).

"There is no doubt that evidence is admissible to show that there was consideration for the deed not appearing upon the face of it:" per Turner, L.J., *Townend* v. *Toker* (1866), L. R. 1 Ch. 446 at p. 459.

"As a general rule, evidence may be given to show that a deed in form voluntary was in truth for valuable consideration:" per Cozens Hardy, L.J., *Re Holland, Gregg* v. *Holland,* [1902] 2 Ch. 360 at p. 388.

Old rule was that if one consideration stated no other could be proved,

It used to be doubted whether, if one consideration appeared on the face of the deed without the words "and divers other considerations," or the like, additional or other consideration could be proved. Lord Hardwicke said: "Where any consideration is mentioned, as of love and affection only, if it is not said also *and for other considerations*, you cannot enter into proof of any other: the reason is because it would be contrary to the deed: for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other:" *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127, at p. 128. But this *dictum* cannot now be relied upon: see *Stiles* v. *Attorney-General* (1740), 2 Atk. 152; *Leifchild's Case* (1865), L. R. 1 Eq. 231; *Townend* v. *Toker* (1866), L. R. 1 Ch. 446; *Llanelly Ry. Co.* v. *London and North Western Ry. Co.* (1873), L. R. 8 Ch. 942.

but is now overruled.

Valuable consideration not expressed proved.

Where the consideration stated in the deed was neither valuable nor good, evidence was admitted to prove valuable consideration: *Stiles* v. *Attorney-General* (1740), 2 Atk. 152.

Evidence was admitted to prove valuable consideration, where a nominal consideration alone was expressed: *Leifchild's Case* (1865), L. R. 1 Eq. 231; and where a nominal consideration "and divers other good causes and considerations" were expressed: *Chapman* v. *Emery,* (1775) 1 Cowp. 278.

Where a settlement was expressed to be made in consideration of natural love and affection and of a covenant and for a nominal consideration, it was held, first, that the covenant was a valuable consideration, and secondly, that evidence was admissible which proved other valuable consideration: *Townend* v. *Toker* (1866), L. R. 1 Ch. 446.

Bargain and sale.

Evidence may be admitted to show that a bargain and sale in which no consideration of money is expressed was made for such a

consideration: *Fisher* v. *Smith* (1599), Moore, 569; *Negus* v. *Reynal* (1661), 1 Keble, 12.

Where no consideration was stated, evidence was admitted to prove, in *Ferrars* v. *Cherry* (1700), 2 Vern. 383, that a settlement made after marriage was really made in pursuance of marriage articles, though this was not stated in the settlement; in *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127, services done by the donee to the donor; and in *Llanelly Ry. Co.* v. *London and North Western Ry. Co.* (1873), L. R. 8 Ch. 942, a pecuniary consideration.

Additional consideration proved.

Where the deed was stated to be for valuable consideration, proof was admitted in *Villars* v. *Beamont* (1555–6), Benl. & Dal. 39; Dy. 146 a, pl. 68, cited at length 1 Rep. 176 a, that a deed apparently made for pecuniary consideration was also made in consideration of marriage; in *Vernon's Case* (1573), 4 Rep. 1; Dyer, 317 a, that a conveyance to a wife on express condition to perform her husband's will was also for her jointure; and in *Rex* v. *Scammonden* (1789), 3 T. R. 474, and *Clifford* v. *Turrill* (1841), 1 Y. & C. C. C. 138; on app. (1845), 9 Jur. 633, that the pecuniary consideration was larger than that stated in the deed.

Where the consideration stated in the deed was 150*l.* paid and an acceptance for 300*l.* *Held* that the vendor might show that he had stipulated for a lien for the 300*l.*: *Frail* v. *Ellis* (1852), 16 Beav. 350.

Where natural love and affection only stated.

Where the consideration was stated to be natural love and affection, evidence was admitted to prove, in *Attwell* v. *Harris* (1619), 2 Roll. Rep. 91, payment of money; in *Tanner* v. *Byne* (1827), 1 Sim. 160, the consideration of marriage; in *Leahy* v. *Dancer* (1828), 1 Moll. 313, the execution of several contemporaneous money bonds; and in *Gale* v. *Williamson* (1841), 8 M. & W. 405, and *Harman* v. *Richards* (1852), 10 Ha. 81, a simultaneous deed forming part of the same transaction.

Where the consideration was stated to be natural love and affection "and divers other good causes and considerations," evidence was admitted to prove, in *Pott* v. *Todhunter* (1845), 2 Coll. 76, a state of things amounting to valuable consideration; in *Thompson* v. *Webster* (1852), 4 Drew. 628; (1859), 4 De G. & J. 600; in Dom. Proc. (1861), 7 Jur. N. S. 531, a family arrangement, which amounted to valuable consideration; and in *Bayspoole* v. *Collins* (1871), L. R. 6 Ch. 228, a pecuniary consideration.

Where valuable consideration is expressed,

Where a deed is expressed to be made for valuable consideration, evidence of natural love and affection would apparently not be admissible, for if it were, no deed made between relations could

natural love, &c., cannot be proved.

ever be upset on the ground of inadequacy of consideration: *Bedell's Case* (1607), 7 Rep. 40 a at p. 40 b; *Foster* v. *Foster* (1663), Thos. Raym. 43; 1 Lev. 55; 1 Sidf. 82; 1 Keble, 160, 225, 274 and 319; *Clarkson* v. *Hanway* (1723), 2 P. Wms. 203; *Willan* v. *Willan* (1814), 2 Dow, 274, per Lord Redesdale, at p. 282. And when fraud is alleged it would seem that a deed expressed to be for valuable consideration cannot be supported, by the averment of the consideration of affection between relatives, or as a gift between strangers: *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627, per Lord Hardwicke, L.C., at p. 628; *Watt* v. *Grove* (1805), 2 Sch. & Lef. 492, per Lord Redesdale, C., at p. 501; *Willan* v. *Willan, ubi sup.*

In *Filmer* v. *Gott* (1774), 4 Br. P. C. 230, evidence was admitted to prove that the consideration of natural love, &c., stated in the deed did not exist, notwithstanding that the parties were relations.

Post-nuptial settlements.

In connection with this subject it may be observed that a post-nuptial settlement of the wife's land (not limited to her separate use: *Shurmur* v. *Sedgwick* (1883), 24 Ch. D. 597), whereby the interests of the husband and wife are modified, was not, prior to the Married Women's Property Act, 1882, voluntary: *Hewison* v. *Negus* (1853), 16 Beav. 594; *Atkinson* v. *Smith* (1858), 3 De G. & J. 186; *Teasdale* v. *Braithwaite* (1876), 4 Ch. D. 85; (1877), 5 Ch. D. 630; *In re Foster and Lister* (1877), 6 Ch. D. 87 (in which case *Goodright* v. *Moses* (1775), 2 W. Bl. 1019, *Currie* v. *Nind* (1835), 1 My. & Cr. 17, and *Butterfield* v. *Heath* (1852), 15 Beav. 408, were disapproved).

Conveyances of leaseholds.

It may also be observed that a conveyance, in form voluntary, of leaseholds is necessarily a conveyance for value within 27 Eliz. (1585) c. 4, owing to the liability on the part of the assignee to pay the rent and perform the covenants of the lease: *Price* v. *Jenkins* (1877), 5 Ch. D. 619; *Ex parte Doble*, (1878) 26 W. R. 407 (*Lee* v. *Matthews* (1880), 6 L. R. Ir. 530, is *contrà*); but is not within the exception in the Bankruptcy Act of 1869, s. 91, (or the Act of 1883, s. 47): *Ex parte Hillman* (1878), 10 Ch. D. 622; and is not a conveyance for value within 13 Eliz. (1571) c. 5 (made perpetual by 29 Eliz. (1587) c. 5): *In re Ridler* (1882), 22 Ch. D. 74; but is regarded as being for value, so as to prevail against an equity of which the assignee had no notice: *Harris* v. *Tubb* (1889), 42 Ch. D. 79.

Grants for life or in tail of freeholds.

Although if a man make a conveyance in fee simple without consideration there is a resulting use to him, still if he make a conveyance, without stating any consideration, for life or in tail no use results to him during the estate for life or in tail, as the

tenancy created is a sufficient consideration: Shep. Touch. 522; Vin. Uses, 188.

Bill of sale.

A bill of sale is avoided in respect of the personal chattels comprised therein if the consideration for which it is given is not truly set forth: 45 & 46 Vict. (1882) c. 43, s. 8.

Proof admissible to show by whom consideration was paid.

A mere statement in the deed that the consideration was paid by A. does not exclude evidence that it was paid by B.: *Rex* v. *Inhabitants of Llangunnor* (1831), 2 B. & Ad. 616.

Consideration not necessary to validity of deed.

Although consideration is not necessary to the validity of a deed, yet if there be no consideration there may be a resulting use for the grantor, as to which see *infrà*, Chapter on Resulting Uses and Estates by Implication; and—

Consideration necessary to raise use.

A use cannot be raised without the consideration of money, money's worth, blood, or marriage.

Considerations insufficient to raise use.

Thus a use was not raised by the consideration of "being ancient acquaintances or chamber-fellows:" *Warde* v. *Tuddingham* (1605), 2 Roll. Abr. 783, pl. 5; "having been schoolfellows together:" 2 Roll. Abr. 783, pl. 6; change of name, *Sir Christopher Hatton's Case*, Vin. Abr. Uses, H. pl. 8, p. 195; cited Jenk. Cent., p. 81, ca. lx.; *Garnish* v. *Wentworth* (1666), Carter, 137; and see *Sharington* v. *Stratton* (1565), Pl. Comm. 298 at p. 302; or "for divers good considerations:" *Mildmay's Case* (1584), 1 Rep. 175 a; *Wiseman's Case* (1585), 2 Rep. 15 a; *Smith and Lane's Case* (1589), 1 Leon. 170; *Ward* v. *Lambert* (1595), Cro. Eliz. 394.

In covenant to stand seised.

In a covenant to stand seised, uses limited, to a bastard child of the covenantor: Co. Litt. 123 a; *Gerrarde* v. *Worseley* (1580), Dy. 374 a; 1 Anders. 75; or to a stranger, whether in possession: *Sir John Mordant's Case*, cited by Rede, J., Y. B., 21 Hen. VII. (1506) 19; *Lord Paget's Case* (1591), 1 Anders. 259 and 263, pl. cclxx.; 1 Leon. 194; Moore, 193; or in remainder: *Wiseman's Case* (1585), 2 Rep. 15 a; 1 Anders. 140; Moore, 195; *Smith* v. *Risley* (1638), Cro. Car. 529; S. C. *sub nom. German* v. *Risley*, Wm. Jones, 418; are void, because he is not within the consideration.

Powers in covenants to stand seised.

A power, which takes effect as the declaration of a use, contained in a covenant to stand seised is void, because the consideration of blood, &c., does not extend to the persons in whose favour the power is exerciseable. Thus a general power of appointment in a

covenant to stand seised was held bad in *Goodtitle and Pettoe* (1732), Fitzgib. 299; 2 Stra. 934; 2 Barnard. K. B. 10, 90 and 142; and in *Warwick* v. *Gerrard* (1686), 2 Vern. 7, where it was held that the power was bad in equity as well as at law.

Power to grant leases.

A general power to grant leases contained in a covenant to stand seised was held bad in *Mildmay's Case* (1584), 1 Rep. 175 a; *Prince* v. *Green* (1598), cited 1 Ca. Ch. 161; *Cross* v. *Faustenditch* (1607), Cro. Jac. 180; *Chute* v. —— (1661), 1 Lev. 30; S. C. *sub nom. Lady Dacres* v. *Hazel*, 1 Keb. 34; and *Baynes* v. *Belson* (1679), T. Raym. 247; but *quaere*, what would be the effect of a power to grant leases or to make a jointure in favour of a person named in the deed who was within the consideration of blood? See Sugd. Powers (8th ed.) 139; *Goodtitle and Pettoe* (1732), Fitzgib. 299; 2 Stra. 934; Barnard. K. B. 10, 90 and 142.

A general power of revocation can be reserved in a covenant to stand seised: Co. Litt. 237 a; Shep. Touch. 525.

Covenant with strangers to stand seised to use of relatives.

It is now settled (contrary to the earlier opinion: *Smith* v. *Risley* (1638), Cro. Car. 529; S. C. *sub nom. German* v. *Risley*, Wm. Jones, 418; *Whaley* v. *Tankard* (1672), 2 Lev. 52) that a covenant with strangers to stand seised to the use of persons within the consideration is good: *Thorne* v. *Thorne* (1682), 1 Vern. 141; see the pleadings at length, 2 M. & W. 512, n.

Uses can be raised by covenant in favour of the husband or wife, or the husband or wife hereafter to be taken, of a relative: *Sharington* v. *Stratton* (1565), Pl. Comm. 298 at p. 307; 2 Roll. Abr. 783, pl. 1, 784, pl. 2, 3, 4; and *Bould* v. *Wynston* (1607), Cro. Jac. 168; 2 Roll. Abr. 786, L.

Relationship can be proved.

A use limited to a person named in a covenant to stand seised may be supported by averment that such person is within the consideration of the covenantor's blood, although the deed is expressed to be in consideration of the covenantor's love for some other person, for the consideration so averred is not inconsistent with the consideration expressed: *Bedell's Case* (1607), 7 Rep. 40 a; *Harpur's Case* (1614), 11 Rep. 23 a; *Goodtitle* v. *Pettoe* (1732), 2 Stra. 934; 2 Barnard. K. B. 10, 90 and 142; Fitzgib. 299.

Peppercorn.

The reservation of a peppercorn rent is sufficient consideration to raise a use to support a recovery: *Barker* v. *Keate* (1677), 1 Mod. 262; 2 Mod. 249; 1 Freem. 249; 2 Vent. 35.

Receipts.

Prior to the coming into operation of the Conveyancing and Law of Property Act, 1881, it was usual to put a receipt for the consideration in the body of the deed (in the operative clause) and also to indorse a further receipt on the deed: but in deeds executed

since 1881 it is usual to omit the indorsed receipt, such receipt having been rendered unnecessary by that Act: Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 54.

Receipt formerly conclusive at law.

The receipt in the body of the deed was, before the Supreme Court of Judicature Act, 1873, came into operation (*i.e.*, the 1st November, 1875), conclusive at law that the purchase-money was paid.

In *Rowntree* v. *Jacob* (1809), 2 Taunt, 141, where the circumstances were full of suspicion; in *Baker* v. *Dewey* (1823), 1 B. & C. 704; and in *Harding* v. *Ambler* (1838), 3 M. & W. 279, where by a miscalculation less than the whole purchase-money was paid, but the receipt was for the whole; the receipt was held at law to estop the vendor from denying that the purchase-money had been paid.

Purchase-money returned.

But even at law evidence was admissible that the purchase-money had been returned: *Baker* v. *Dewey* (1823), 1 B. & C. 704; or to show some matter happening after execution which prevented the payment; as in *Deverell* v. *Whitmarsh* (1841), 5 Jur. 963, where the consideration was paid by cheque, which was dishonoured; it was argued that the receipt was conclusive to show that the money was actually paid; but Tindal, C.J., said (at p. 965): "Not at all. The parties may show what occurred at the time. Suppose the man put his hand on the table and took the money back?" and it was held that evidence of the dishonour of the cheque might be given.

Receipt qualified by recital.

In *Lampon* v. *Corke* (1822), 5 B. & Ald. 606; S. C. *sub nom. Lambourne* v. *Cork*, 1 D. & R. 211, the recital being of an agreement to pay, and not of an actual payment, the operative part being "the said sum of 40*l.* being now so paid to the said —— as hereinbefore is mentioned," and the receipt being "the payment of which said several sums of money they the said —— do hereby admit," it was held that the receipt either had reference to some nominal considerations mentioned in the deed, or that it was qualified by the recital so as not to estop the vendor from denying that the money had been paid. This case is discussed and was followed (by a majority of the Court) in *Bottrell* v. *Summers* (1828), 2 Y. & J. 407.

Receipt never conclusive in equity, and not now conclusive either at law or in equity.

Neither the receipt in the body of the deed, nor the indorsed receipt, was in equity conclusive that the purchase-money had been paid, and this is now the rule both at law and in equity.

In *Coppin* v. *Coppin* (1725), 2 P. Wms. 291; *Winter* v. *Lord Anson* (1827), 3 Russ. 488; *Hawkins* v. *Gardiner* (1854), 2 Sm. & G. 441; and *Wilson* v. *Keating* (1859), 27 Beav. 121; on app. 4 De G. & J. 588, the vendor was allowed in equity to prove that the purchase-money had not been paid.

Third parties.

Third parties, however, were even in equity entitled to rely on the indorsed receipt.

Indorsed receipt.

"The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt and often a release under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand:" per Fry, L.J., *Bickerton* v. *Walker* (1885), 31 Ch. D. 151 at p. 159; and in *Morgan's Patent Anchor Co.* v. *Morgan* (1887), 35 L. T. 811, Amphlett, B. (at p. 813), also remarks on the importance of an indorsed receipt.

Indorsed receipt gives better equity.

A mortgagee by deposit of a conveyance with an indorsed receipt was held to have a better equity than the vendor who had not received the purchase-money mentioned in the receipt: *Rice* v. *Rice* (1853), 2 Dr. 73; *Hunter* v. *Walters* (1871), L. R. 7 Ch. 75; *French* v. *Hope* (1887), 56 L. T. 57; 56 L. J. Ch. 363. The transferee of a mortgage with an indorsed receipt was held to have a better equity than the mortgagor who had not received the whole of the money mentioned in such receipt: *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, which overrules *Parker* v. *Clarke* (1861), 30 Beav. 54, unless that case can be distinguished on the ground that there was no receipt indorsed on the deed, which does not appear from the report. A receipt clause was held to be binding on the mortgagor as between himself and a sub-mortgagee, although the full amount acknowledged to have been received had not in fact been received: *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

Absence of indorsed receipt.

On the other hand, the absence of the indorsed receipt or its unusual position was sufficient to put persons on inquiry as to

whether the consideration had been paid. Thus, in *Kennedy* v. *Green* (1834), 3 Myl. & K. 699, the unusual position of an indorsed receipt was considered to give notice that a fraud had been committed; and in *Greenslade* v. *Dare* (1855), 20 Beav. 284, it was held that the absence of an indorsed receipt from a purchase deed put the purchaser on inquiry as to whether the purchase-money had been paid, but did not give constructive notice of any other irregularities in the purchase. See also *Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18.

Indorsed receipt no longer necessary.

But by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 55: "A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser" (which includes a lessee or mortgagee and an intending purchaser, lessee or mortgage, or other person, who for valuable consideration takes or deals for any property: sect. 2 (viii.)) "not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part be sufficient" (which is probably the same as conclusive) "evidence of the payment or giving of the whole amount thereof:" *King* v. *Smith* [1900] 2 Ch. 425; *Rimmer* v. *Webster* [1902] 2 Ch. 163.

Reliance must be placed on receipt.

But a purchaser cannot rely on this section of the Act unless he was aware of the existence of the receipt. Thus where a building society executed the usual statutory receipt on a mortgage made to them, and handed the deed with the receipt thus indorsed thereon to their solicitor, who purchased the equity of redemption and deposited the title deeds, other than the mortgage deed which he suppressed, with his bank as security for a loan; it was held by Chitty, J., that the bank, not having had notice of the mortgage or the indorsed receipt, and not having advanced their money on the faith of the receipt, were postponed to the building society, who had in fact never been paid off: *Lloyds Bank, Ltd.* v. *Bullock* [1896] 2 Ch. 192.

Receipt on mortgage to building society.

The receipt given by a building society on payment off of money advanced by the society on mortgage operates by statute 6 & 7 Will. IV. (1836) c. 32, s. 5, and Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 42, as a reconveyance of the land to the person who has the best equity to the land: per Lord Watson, *Hosking* v. *Smith* (1888), 13 Ap. Ca. 582 at p. 589.

CHAPTER XIII.

PARCELS.

General Description: Special Description: Inaccurate Description: Collective Name: General Descriptions mutually Restrictive: Special Description restricts General: Falsa demonstratio non nocet: General Description restricted to Matters ejusdem generis: Only Freeholds Pass by Freehold Assurances: Whether Leaseholds pass as Personal Property: Soil of Highway: Bed of Non-Tidal River: Islands: Tidal Rivers: Streets in Towns: Pathways: Private Roads: Uninclosed Strips: Strips near Commons: Party Walls: Creation of profits à prendre: Of Easements: Of Rights of Way: Extent of Right of Way: Exceptions, Reservations and Privileges distinguished.

General name.

A THING is always designated by (1) a general name, which is equally applicable to every member of the class to which it belongs, and (2) some superadded description to show which member of the class is intended.

"A house," "a farm," "a wood," are all general names; each of them equally fits every member of the class.

There are two modes of designating or identifying any particular member of the class.

Description by general names only.

First, the thing may be described by several general names; in other words, as belonging to several classes. In this case, if only one thing satisfies all the descriptions, that is the thing meant; if more than one thing satisfies all the descriptions, there is a case of equivocation.

It often happens that the same thing can be described by two totally different descriptions; *e.g.*, the same lands may be described by the two descriptions following: "the tithe-free lands in the parish of E.," and "the ancient woodlands inherited by A."

In each of these descriptions all the names are general, and in each case, if any one of the general names is omitted, a larger number of things is described than if all the names are used; in

words, where a thing is described by several general names, the descriptions are mutually restrictive.

Secondly, to the general description may be added either the individual name, if there be one, or a special description which fits only the particular member of the class designated by the general description. Thus, the pieces of land before described may be described as "the woods called Highhurst," or "the woods in the occupation of A." More commonly, however, there are added to the general description both the individual name and a special description, as "the ancient woodlands in the parish of E., known as Highhurst, in the occupation of A."

Description by general name and special description.

It will be observed that if a description, though general in form, does in fact designate one thing only, the addition of any special description is useless; but if, as usually happens, a general description designates more than one thing, the special description indicates which of those things is meant; in other words, if any thing exists which satisfies both the general and the special description, that only is intended, *i.e.*, the special description restricts the general description.

It sometimes happens that, while the description renders it certain what is intended, as "A.'s house in London," where A. has only one house there, some further description is added which is wholly or partially inaccurate. If A.'s house is in the occupation of B., and is described as "A.'s house in London, in the occupation of C," the words "in the occupation of C." are inaccurate, and should be rejected.

Inaccurate description.

In a simple case like the one just mentioned there is little difficulty; but cases occur in which part of the description designates all the parcels in such a manner that if that part stood alone it would be accurate, while the other words of the description apply to a part only of the parcels, so that it remains doubtful whether these latter words are intended to restrict the other part of the description, or are to be rejected as inaccurate. Thus, if A. has lands known as "the T. estates," in the adjoining counties of Hants and Wilts, the description "A.'s T. estates in the county of Hants," would probably be intended to pass only that part of the property which is situate in Hants; in other words, the phrase "in the county of Hants" would be restrictive. But if A. had a house called S., standing in the two counties, the description "A.'s house called S., in the county of Hants," would probably be intended to pass the whole house called S.; in other words, the phrase "in the county of Hants" would not be restrictive; the only

reason for introducing it is to help to point out which house is intended. It would be more difficult to determine what is meant by "Brosley Farm, in the county of Hants," if the farm were partly in Hants and partly in Wilts.

Collective name.

A collective name is the name of a group of things, not necessarily of the same class; thus, "an estate" may include corporeal and incorporeal hereditaments of any nature; "a farm" includes a house, and arable and pasture lands. One superadded description will generally denote the particular group intended, as "A.'s estate," or "A.'s issue," and a further description may either, *first*, show that some members of the group are alone intended, as "A.'s estate in the county of H.," where A.'s estate lies in the counties of H. and W.; or "A.'s adult issue," where A. has issue both adult and under age; or, *secondly*, be intended as a further designation of the particular group as "A.'s estate in the occupation of B." where B. occupies the whole of A.'s estate.

Though the three following rules have often been laid down, there is so much difficulty in applying them, mainly owing to the fact that words descriptive of occupation, locality, and the like are sometimes used as general names, *i.e.*, as restrictive words, in which case they cannot be rejected, and sometimes as words of special description, in which case, if they do not fit the thing, or all the things, described by the rest of the description, they must be rejected, that it is considered convenient to state all the rules before proceeding to an analysis of the cases.

Where the descriptions are all general or collective all must be satisfied.

> Where the parcels are described by several general descriptions, or by a collective, and a general, description, those only are intended which satisfy all the descriptions.

This rule may also be stated in each of the following modes:—"General descriptions are mutually restrictive;" "If the parcels are described as being members of more than one class, those only are intended which are members of each class."

Where there is a general and a special description both must be satisfied.

> Where the parcels are described by a general, or collective, and also by a special description, those only are intended which satisfy both descriptions: *Wrotesley* v. *Adams* (1558), Plow. 187 at p. 191.

These two rules are often expressed as follows:—

"*Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram.*"

"Though falsity of addition or demonstration doth not hurt, where you give the thing a proper name, yet nevertheless if it stand doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood:" Bacon's Law Tracts, Rule 13.

And at the end of the same rule, after giving instances of things having several descriptions attached to them, Bacon says: "But if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true:" Bac. Law Tracts, Rule 13.

"*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quae clausulae generali sunt consentanea, interpretanda est carta secundum verba specialia.* The same rule almost word for word is put and agreed on both sides in Y. B. 7 Edw. III. (1333), 10 a, *Margery Mortimer's Case, sc.*, 'Where a deed speaks by general words and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words; as if a man grants a rent *in manerio de D., percipiend'* in 100 acres of land, parcel of the same manor, with clause of distress in the 100 acres, the rent shall issue out of the 100 acres only, and the general words shall be construed according to the special words':" *Altham's Case* (1610), 8 Rep. 150 b at 154 b.

"The rule means that if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false they shall be intended words of true limitation to pass only those lands wherein all the circumstances are true:" per Alderson, B., *Morrell* v. *Fisher* (1849), 4 Ex. 591 at p. 604 (a case upon a will).

In cases falling within this rule it will generally be found that there is only one special description, as "A.'s house," "Brosley Farm;" if there are several special descriptions and each of them denotes the same thing, as "Brosley Farm, which is delineated in the map annexed hereto," where the map accurately describes Brosley Farm, the rule applies, but if they do not both denote the same thing the next rule applies.

Falsa demonstratio non nocet.

Where the parcels are described by both a general or collective, and a special description, or divers special descriptions, and nothing exists which satisfies all descriptions, but something exists which satisfies some or one of them, and is described with sufficient certainty, the other or others may be disregarded.

In cases falling within this rule it will generally be found that there is more than one special description, though of course there *may* be only one special description, as in *Roe* d. *Conolly* v. *Vernon and Vyse* (1804), 5 East, 51, stated *infrà*, p. 219, where the statement of the rent was the only special description.

The rule is sometimes stated as follows:—"*Falsa demonstratio non nocet:*" or, "if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect."

"Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected:" Preston in Shep. Touch. 247. (The position is immaterial. See *infra*, p. 225.)

"There is a diversity where a certainty is added to a thing that is incertain" (*i.e.*, described by a general name) "and where to a thing certain. For if I release all my right in all my lands in Dale which I have by descent on the part of my father, and I have lands in Dale by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void, for if the releasee will aid himself by the release he ought to aver that I had such lands in Dale by descent on the part of my father, to which the release extended, and the same is issuable, and if he cannot aver this, then the release is void. And so the words of the certainty—viz., which I have by descent on the part of my father—being added to the general words which were incertain, are of effect. But if the release had been in Whiteacre in Dale which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good, and the releasee shall not be compelled to take any averment, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary but superfluous, and therefore he shall not there take an averment

upon a thing which is of no effect, be the same true or false:" *Wrotesley* v. *Adams* (1558), Plowd. 187 at p. 191.

The distinction taken in the above passage is well pointed out in the marginal note to *Roe* d. *Conolly* v. *Vernon and Vyse* (1804), 5 East, 51, as follows:—"Where there is a grant of a *particular* thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it will not frustrate the grant; but where a grant is in *general* terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant."

"The rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration:" per Parke, J., *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43 at p. 51.

"As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it:" per Parke, B., *Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183 at p. 189; adopted per Monahan, C.J., in *Dublin and Kingstown Ry. Co.* v. *Bradford* (1857), 7 Ir. C. L. Rep. 57 at p. 63.

"One of the rules of construction is '*falsa demonstratio non nocet*,' which means that if there be an adequate and sufficient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it:" per Alderson, B., *Morrell* v. *Fisher* (1849), 4 Exch. 591 at p. 604 (a case on a will).

Examples of words used restrictively.

In all the following cases the added descriptions were held to be restrictive.

Name of place.

Grant of "all those messuages, &c., in the occupation of B., in the city of W., formerly belonging to the hospital of W." *Held*, that lands in the occupation of B., not within the city of W., but which formerly belonged to the hospital of W., did not pass: *Doddington's Case* (1594), 2 Rep. 32 b; S. C. *sub nom. Hall* v. *Peart*, Pop. 60.

"The King had two mills under one house and granted all the houses, mills, lands, &c. in Wells and the suburbs and liberties thereof. One of the mills was in Wells and the other out of Wells and the liberties and suburbs thereof, and whether this mill passed forasmuch as both were under one roof? and adjudged for the plaintiff that it passed not:" *Hall* v. *Combes* (1594), Cro. Eliz. 368.

Occupancy.

R., tenant for years of the farm called C., consisting of H. and other parcels, appoints A. his executor and dies. A. demises all except H. to B., and H. to F., and afterwards grants the residue of his term in the whole to B. and F. The reversioner grants a rent

issuing out of all his lands and tenements commonly called C., formerly in occupation of R., and now in the tenure and occupation of B. *Held*, that H. was not charged with the rent: *Ognel's Case* (1587), 4 Rep. 48 b at p. 50 a; 1 Anders. 178; 4 Leon. 115.

Demise of "all my house and two yard-lands in B. in the possession of G.;" G. was in possession of all except two acres. *Held*, that the two acres did not pass: *Bartlett* v. *Wright* (1593), Cro. Eliz. 299. (It should be remembered that a yard-land often consisted of a number of detached strips.)

Demise of "all that messuage, &c., on the south side of Speenham land, called the 'Old Fighting Cocks,' now or late in the occupation of J." The question being whether the demise included the soil of a gateway under a portion of the messuage, leading to a yard behind it, in which were some small houses not included in the demise, the tenants of which had always used the gateway, it was held that in the absence of evidence that the soil of the gateway had been in the exclusive occupation of J., it did not pass by the demise: *Dyne* v. *Nutley* (1853), 14 C. B. 122. Williams, J., remarked (at p. 127) that "the words 'now or late in the occupation of J.' were essential words and not mere words of demonstration."

Occupation, what amounts to.

On the point what is an occupation of land it has been said: "If a man grant all his lands called D. in the tenure, occupation or possession of J. S., and J. S. had parcel of D. in lease, and parcel not, but depastured it with his cattle, all shall pass by the grant: so where the parcel which was not in lease to J. S. was enclosed, being a wood, but the fence was thrown down in several places whereby the cattle used to escape generally and depasture in the wood, this is a sufficient occupation to make this pass, for the taking of the herbage is a sufficient occupation:" *Dockray* v. *Besis* (1614), 2 Roll. Abr. 54 Q. 1 and 2; cf. Co. Litt. 4 b.

Title.

Queen Elizabeth granted the manor of D. which she had by attainder of Sir Thomas Wyat, whereas in truth she was seised thereof by descent. Dyer, J., thought the grant was void, and Brown and Weston, JJ., agreed that it would be void at common law, because the Queen was deceived in her grant; but the statute of misrecitals applied, for the substance of the thing granted appeared with certainty and the statute supplied all other defects: *Anon.* (1563), Moore, 45.

A grant of "all my houses in Chesterfield, &c. in the tenure of A. B. C. which my father purchased from" divers named persons. *Held*, that lands and houses which the grantor's father had inherited did not pass: *Clay and Barnet's Case* (1613), Godb. 236.

Where an Act of Parliament giving powers of sale and exchange over estates settled by a former settlement and Act, contained a recital of the objects of the Act restricted in terms to such settled estates, and then vested in trustees all and singular the lands in certain counties limited by the former settlement and Act, which were described in the schedule. *Held*, that lands not included in the former settlement or Act, though described in the schedule, did not pass: *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378. (The settlement and Act are given at length, *Shrewsbury* v. *Scott* (1859), 6 C. B. N. S. 1.)

Quality.

A lease of a piece of land "lying near to the said cottage containing, &c., lately used as garden ground and some time since in the tenure of R. B.," was held not to pass a particular piece of waste land unless it could be shown to have been used at some time or other as garden ground: *Kingsmill* v. *Millard* (1855), 11 Exch. 313.

Enumeration.

Settlement of "all that messuage or dwelling-house, with the lands, &c., thereto belonging, situate, &c., and now or late in the occupation of B., his under-tenants or assigns, and which said messuage, dwelling-house, and lands are also known or described by the names, and contain the several quantities by admeasurement, following, that is to say, &c." Then followed a list of the names and acreages of the several closes contained in the farm, with the omission of four. *Held*, that although the whole farm, including the four closes, had been let to B. at one rent, the four closes not mentioned in the settlement did not pass: *Griffiths* v. *Penson* (1863), 1 N. R. 330; 9 Jur. N. S. 385.

Inventory or schedule.

A conveyance of all that messuage, &c., with the barns, &c., and several closes, &c., of land called G. Farm, in the occupation of D. B., and containing altogether, &c., and consisting of the several particulars specified in a schedule and more particularly delineated in the map drawn in the margin of the said schedule, was held not to pass a close omitted (by mistake as was alleged) from the map and schedule: *Barton* v. *Dawes* (1850), 10 C. B. 261; 19 L. J. C. P. 302.

Bill of Sale.

Assignment by bill of sale to B. of "all the household goods and furniture of every kind and description whatsoever in the house No. 2, Meadow Place, more particularly mentioned and set forth in the inventory or schedule of even date herewith, and given up to B. on the execution hereof." At the time of the execution one chair was delivered to B. in the name of the whole of the goods. The inventory did not mention all the goods in the house. *Held*, that no goods passed except those specified in the inventory: *Wood* v. *Rowcliffe* (1851), 6 Exch. 407. Where all the goods in the

grantor's house "which are more particularly described in the schedule hereto," were assigned, it was held that the reference to the schedule did not restrict the generality of the words in the body of the deed: *Baker* v. *Richardson* (1858), 6 W. R. 663; and in *Cort* v. *Sagar* (1858), 3 H. & N. 370, a reference to schedules was held not to be restrictive under special circumstances; but, on the other hand, where an assignment of a debtor's property included his chattels in the most comprehensive words, "all of which are intended to be more particularly described in the schedule hereunder written," it was held that only those chattels which were specified in the schedule passed: *In re Craig* (1869), Ir. R. 4 Eq. 158.

Map.

A conveyance contained a full and accurate description of the "Dromardmore" estate, containing 1,085 acres, "and described in the annexed map." The annexed map was proved to comprise several acres of land which formed no part of Dromardmore, but were part of Dromardbeg. *Held*, that the first description should prevail, and that nothing passed by the deed which was not part of Dromardmore: *Roe* v. *Lidwell* (1860), 11 Ir. C. L. Rep. 320.

In *Lyle* v. *Richards* (1866), L. R. 1 E. & Ir. Ap. 222, a boundary line of the premises was described "as a line drawn from A.'s house to a boundstone, situate, &c.," and the description of the parcels was followed by the words "and which said premises are particularly delineated by the map on the back of this sett;" the house was incorrectly drawn on the map. *Held*, that the map must be taken as part of the description, and that the boundary line must be taken as drawn on the map. This case will be found fully discussed in Dart, V. & P. (7th ed.) 1011, where Mr. Dart says: "Lord Westbury dissented from this view, and held that as the error in the plan could not be discovered without the aid of extrinsic evidence, there was a latent ambiguity, which was matter of fact to be determined by the jury on the evidence, not matter of law depending on the construction of the deed. A plan is a part of a deed to be interpreted, like every portion of the instrument, by the Judge: but, as Lord Westbury observed, the question here was not one of the interpretation of the deed itself, or even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects, one of which was proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence. The latter seems the sounder view: the

construction of the plan was matter of law so long only as its accuracy was unimpeached: being proved to be inaccurate, it became a question of fact what parcels were comprised in the lease: for it did not follow that, because the boundary line was drawn from the north-east corner of the house, as incorrectly represented on the plan, it would have been drawn from the same point, if the true site of the house had been shown."

Conveyance of a capital messuage and all (*inter alia*) "yards thereto belonging and therewith occupied and enjoyed . . . delineated on the plan and thereon coloured," with the usual general words, which comprised yards. *Held*, to pass a part of a stable-yard which was used with the messuage and delineated, but not coloured, on the plan: *Willis* v. *Watney* (1882), 30 W. R. 424; 51 L. J. Ch. 181.

Map must be referred to in deed.

In order to incorporate a map into a conveyance it is not sufficient that it be merely annexed thereto and purport to be the map referred to in the conveyance, it must be in fact referred to in the conveyance: *In re Otway's Estate* (1862), 13 Ir. Ch. Rep. 222; *Wyse* v. *Leahy* (1875), Ir. R. 9 C. L. 384; and probably a map drawn on but not referred to in a conveyance could not be used to explain the conveyance. Words referring to particulars of sale will probably not incorporate in the conveyance the map which was annexed to or formed part of such particulars: *Barlow* v. *Rhodes* (1833), 1 Cr. & Mee. 439.

Special description.

Where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c., whatsoever in the manor, which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4*l*. 10*s*. 8*d*. and compounded for;" it was held that the words "compounded for" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor, and that the words "being of the yearly rent of, &c.," which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction: *Roe* d. *Conolly* v. *Vernon* (1804), 5 East, 51.

A conveyance of two closes "formerly copyhold but since enfranchised." *Held*, not to include an adjoining copyhold strip not enfranchised: *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

Examples of rejection of words.

On the other hand there are numerous cases in which the added description has been rejected as mere *falsa demonstratio*.

Title.

"If the release had been in Whiteacre in Dale, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good . . . for the thing was certainly expressed by the first words, in which case the expression of another certainty is not necessary:" *Wrotesley* v. *Adams* (1558), Plow. 187 at p. 191; *Earl of Leicester* v. *Heydon* (1571), Plow. 390 at p. 395; Shep. Touch. 247.

Name.

Conveyance of all "that part of the Bog of Allen and Clunagh situate in the barony of Carbery and county of Kildare containing 777 acres, 3 rods, 24 poles, as described by a map annexed hereto." It turned out that part of the land described by the map amounting to 20 acres, 3 rods, 6 poles, formed part of the Bog of Muckland, not of Allen and Clunagh. *Held*, that the whole of the land described in the map passed. Willes, J., in delivering the opinion of the Judges, said, "The words of the conveyance, taken in connection with the map, which is referred to, and made part of it, are sufficient to describe the land in question, and to express an intention to convey it. The omission to describe the land by the name of 'Muckland,' and even the description of it as within another denomination, amount at most to an erroneous additional description of that which is identified beyond doubt by reference to the map, *constat de corpore:*" *Rorke* v. *Errington* (1859), 7 H. L. C. 617 at p. 625.

Quality.

Grant of all that garden plot late in the tenure of Juxten, now in the tenure of Ireland. Ireland had built houses on part of the plot. *Held*, that the reversions of these houses passed: *Burton* v. *Browne* (1622), 2 Roll. Rep. 261, 265, 267; Palm. 319; Cro. Jac. 648.

Quantity.

"If one grant in this manner 'all my meadow in D. containing ten acres,' whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres:" Shep. Touch. 248; *Willoughby* v. *Foster* (1552), Dy. 80 b.

A conveyance was made by reference to a schedule, and the portion of the schedule which related to the parcel in question stated it in the first column, which was headed, "No. on the plan of the Briton Ferry Estate," to be "153 b"; in the second column, under the heading "Description of Premises," it was stated to be "a small piece marked on the plan"; in the third, it was described as being in the occupation of J. E.; and in the fourth, as containing thirty-four perches. The piece 153 b, as marked on the plan, contained twenty-seven perches only. *Held*, that the description in the plan must prevail, the acreage being rejected as *falsa demonstratio: Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183;

12 L. J. Ex. 243. "The portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from the subsequent statement that it contains thirty-four perches. That, however, becomes merely a false description of that which is conveyed with convenient certainty before. . . . It is a mere *falsa demonstratio*, and does not affect that which is already sufficiently conveyed:" per Parke, B., 11 M. & W. 183 at p. 189; 12 L. J. Ex. 243 at p. 246.

Demise of "all that part of the townland of B., containing 509 acres, arable, meadow, and pasture, English statute measure, for three lives renewable for ever, bounded by" certain specified boundaries. *Held*, to pass 400 acres of bog and land reclaimed from bog lying within the same boundaries in addition to the 509 acres: *Jack* v. *M'Intyre* (1845), 12 Cl. & F. 151; S. C. *sub nom. Dawson* v. *Bell* (1840), 3 Ir. L. R. 140; (1842), 5 Ir. L. R. 229.

Boundaries.

"Then it is described as bounded on the east by (*inter alia*) the defendant's property. But this general description of the boundaries does not cut down the effect of the prior description. When, after a description of a property, it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary, but this is not enough to exclude what is not so bounded, if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it:" per Jessel, M.R., *Francis* v. *Hayward* (1882), 22 Ch. D. 177 at p. 181.

Conveyance of land, the exact dimensions being stated in the parcels and marked on a plan, and stated to be, though not in fact, "bounded on the west by the seashore." *Held* (Romer, L.J., *diss.*), that the latter words must be rejected: *Mellor* v. *Walmesley*, [1905] 2 Ch. 164.

Occupancy.

"If one grant in this manner 'all my manor of W., late parcel of the possession of the Abbot of S., and late in the possession of K.,' and in truth it was never in the possession of K.; this grant is good notwithstanding:" Shep. Touch. 247.

Lease of "all their farm in B. in the occupation of W." "The lease is of all their farm in B., which word (*farm*) is a capital messuage, and all the lands lying to it, and signifies the chief house and the lands belonging to it, and not a common house, and so has a certainty in itself. And when it goes further and says, *in the tenure and occupation of W.*, this is of no effect, for if it was not in his tenure and occupation, yet it should pass, for there

is a certainty in the thing demised, viz., the farm in B., and so another certainty put to a thing which was certain enough before, is of no manner of effect: " per Curiam, *Wrotesley* v. *Adams* (1558), Plow. 187 at p. 191.

A man having lately purchased a house in D. of T. C., and having no other house in D., made a conveyance thereof by the description, " the messuage lately of R. C. in D." *Held*, that it passed: *Windham* v. *Windham* (1581), Dy. 376 b; see also Shep. Touch. 247, 248.

Demise of " all that glebe land lying in A., viz., seventy-eight acres of land, and also the tithes of the said seventy-eight acres, all which lately were in the occupation of P." It appeared that P. had never been in occupation of the tithes. *Held*, nevertheless, that they passed by the lease: *Swyft* v. *Eyres* (1639), Cro. Car. 546; S. C. *sub nom. Vicars Choral de Litchfield* v. *Ayres*, W. Jones, 435.

Where the words of a deed were sufficient to pass all the property comprised in a former deed, but the description of occupancy was incorrect, the property passed: *Wilkinson* v. *Malin* (1832), 2 Cr. & J. 636; 2 Tyr. 544.

Lease of " all that part of the park called B., situate and being in the county of O. and now in the occupation of S.," lying within certain specified abuttals, together with the houses belonging thereto, " and which now are in the occupation of S." *Held*, that a house on a part within the abuttals, but not in the occupation of S., passed: *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43; 2 Nev. & M. 240.

A house was demised to A. except the roof, which the landlord retained and soon afterwards demised to the owner of the adjoining house. After the determination of the lease to A., the landlord demised the house by the description of " all that shop, situate at, &c., as the same was late in the occupation of A." *Held*, that the words, "as the same was late in the occupation of A.," were inserted for the purpose of identification only, and not of restricting the property which passed, and accordingly that the roof passed: *Martyr* v. *Lawrence* (1864), 2 De G. J. & S. 261.

Locality.

If a parish lie in two counties, viz., Berks and Wilts, and one grant in this manner, 'all his close called Callis in the parish of Hurst in the county of Berks,' and in truth the close doth lie in the county of Wilts; this is a good grant to pass the close: *Norris' Case* (1570), Dyer, 292 b.

Distinction between parish and vill.

It is necessary to bear in mind the distinction between a parish and a vill: " The civil division of the kingdom was originally into counties, hundreds and vills, tithings, or townships; for parishes

were divisions only in reference to ecclesiastical affairs, of which the common law took no notice; but in process of time parishes became divisions in reference to civil matters:" 4 Cruise, Dig. tit. xxxii. c. 21, s. 32. Demivills and hamlets are civil divisions smaller than vills: 1 Bl. Comm., p. 114; "but 'vill' and 'hamlet' are in common acceptation used as synonymous terms:" per Kenyon, C.J., *R.* v. *Morris* (1792), 4 T. R. 550 at p. 552. There may be several vills or towns in a parish or several parishes in a town: Com. Dig., tit. Parish. Hamlet.

It appears that a conveyance of all a man's lands in a named parish, or in named liberties, will pass his lands in every vill in that parish or those liberties: *Waldron* v. *Ruscarit* (1671), 1 Vent. 170; *Jones* v. *Wait* (1675), 1 Mod. 206; S. C. *sub nom. Lever* v. *Hosier*, 2 Mod. 47.

And where there are several vills, if the constablewick of the one goes over all the rest, that is the superior or mother-vill, and the land which is (*sic*) the other, shall pass *per nomen* of all the lands in that: *Waldron* v. *Ruscarit* (1671), 1 Vent. 170; S. C. *sub nom. Waldron* v. *Roscarriot*, 2 Keb. 802—848; 1 Mod. 78.

But if a fine be levied of lands in a town, lands in a hamlet of that town will not pass thereby when there are constables of the hamlet distinct from the constables of the town; "so that they were as two vills:" *Anon.* (1671), 1 Vent. 143. And a conveyance of all a man's land in A., where there is both a parish and a vill of that name, will pass only the lands in the vill: *Whites* v. *Farmor* (1599), 2 Roll. Abr. 54, pl. 32; 2 And. 124, ca. lxx.; *Stork* v. *Fox* (1606), Cro. Jac. 120; S. C. *sub nom. Stoke* v. *Pope*, 2 Roll. Abr. 54, pl. 30 and 31; *sub nom. Stock* v. *Pope*, Noy, 17; *Amys* v. *Cowley* (1648), Aleyn, 88. But *Anon.* (1597), Owen, 60, is *contrà*. And where no part of the lands was situate in the vill they were nevertheless held to pass by an assurance by deed and recovery, being described in the deed as lying in the parish of R., and in the recovery as lying in R., for the deed and recovery were but one assurance: *Addison* v. *Otway* (1677), 1 Mod. 250; 2 Mod. 233; 3 Keb. 771; 2 Vent. 31; Freem. K. B. 227, 240. Town.

But in a more modern case, where Belforth was the name of a parish, and also of a vill in the parish, in the deed the parcels were described as the tithes of the village of Belforth, but in the recovery as the tithes of the parish of Belforth, and it was held that the tithes that were in both the vill and the parish passed, and that those in the parish but not in the vill did not pass: *Gibson* v. *Clark* (1819), 1 Ja. & W. 159.

If a place be named generally, it is *primâ facie* a vill: *Addison* v. *Otway* (1677), 1 Mod. 250; 2 Mod. 233; 3 Keb. 771; 2 Vent. 31; Freem. K. B. 227, 240; *Vinkeston* v. *Ebden* (1698), cited 2 Salk. 501.

Parish.

"If the grant be in this manner, 'All that my house in the occupation of J. S., in St. Andrew's parish,' whereas in truth it is in the parish of K., but in the occupation of J. S., it seems this grant is good to pass the house:" Shep. Touch. 247. *Sed vide Campian's Case* (1574), Dyer, 292 b.

"No man can doubt of the intent of this deed to pass those lands; it has conveyed so many acres in the possession of A., B., and C., the name of the parish only is mistaken. . . . Why did the parties mention the parish at all in the deed? it was unnecessary:" per Mansfield, C.J., *Lambe* v. *Reaston* (1813), 5 Taunt. 207 at p. 211; 1 Marsh. 23; but see *Cotterel* v. *Franklin* (1815), 6 Taunt. 284.

Map.

Demise of all minerals in, upon, or under all or any part of certain hereditaments "described and set forth in the map hereunto annexed, and also in, upon, or under all or any part of M., all which premises are situate in the townships of, &c., and are bounded, &c., and contain together 1,400 acres of land or thereabouts, all which are particularly described, delineated, and distinguished in the map or plan thereof annexed to these presents, and which by the agreement of all the said parties hereto is meant and intended to be taken as part of this indenture." *Held*, on a dispute arising as to the boundary, and the map being on so small a scale that it was impossible that it could ascertain the boundary with sufficient precision, that the words of the demise were not to be controlled by the map: *Taylor* v. *Parry* (1840), 1 Sco. N. R. 576; 1 Man. & Gr. 604.

Reference to plan.

A conveyance of lands excepted a piece of land particularly described in the parcels and by reference to a plan; the plan included part of the excepted land in the conveyed land. *Held*, the description on the plan was a false demonstration which might be rejected: *Dublin and Kingston Ry. Co.* v. *Bradford* (1857), 7 Ir. C. L. Rep. 57.

Erroneous enumeration.

Cases of erroneous enumeration must be carefully distinguished from cases where the first description, being general in character, is restrained by the subsequent enumeration of the particulars, as in *Griffiths* v. *Penson* and other cases cited *ante*, p. 217.

Bargain and sale of all his woods, underwoods, &c., standing, &c., in the whole of his manor of C., viz., in all his wood called E., and in all his wood called F. *Held*, that woods in C., not being any of

the woods afterwards expressly named, passed by the conveyance: *Stukeley* v. *Butler* (1614), Hob. 168.

Schedule.

The mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brasswork, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade, in and upon the before-mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors. *Held*, that the stock-in-trade was not included in the mortgage: *Ex parte Jardine* (1875), L. R. 10 Ch. 322.

Bill of sale.

A bill of sale was made of "all the goods, fixtures, &c. . . . belonging to us and in and about the messuage . . . and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed," but the schedule was not annexed; it was held that the deed was operative without the schedule: *Dyer* v. *Green* (1847), 1 Ex. Ch. 71.

Title.

Conveyance by husband and wife of all the messuages of them or either of them in certain counties, "all which said hereditaments were heretofore the estate and inheritance of" the wife. *Held*, that the husband's own property passed: *Youde* v. *Jones* (1844), 14 Sim. 131 (see p. 149).

Where there are two certain descriptions, old rule was that first could not be rejected.

It has been said that when there are two certain descriptions, the first shall necessarily prevail; but this appears not to be correct.

A bargain and sale of "all his tenements in the parish of St. Andrew in Holborn, in the occupation and tenure of W. G.," was held to pass nothing, as the vendor had nothing in the parish of St. Andrew, though he had property in St. Sepulchre in the

occupation of W. G. One of the points resolved was the following:—"First, that nothing passed by the said bargain and sale, for notwithstanding the latter certainty, *scil.* in the tenure of William Gardiner, was true, yet because the first certainty, *scil.* in the parish of St. Andrew in Holborn, was false, for this cause the bargain and sale was utterly void. But otherwise, had it been, if a true certainty had been in the first place, as if he had bargained and sold, 'the tenements, &c., in the tenure of William Gardiner in the parish of St. Andrew, Holborn,' there it was agreed that the tenements shall pass well enough notwithstanding the addition of the falsity for *utile per inutile non vitiatur:*" *Dowtie's Case* (1584), 3 Rep. 9 b; S. C. *sub nom. The Duke of Northumberland's Case*, 1 Leon. 21; Shep. Touch. 247.

So it was held that a certain messuage passed, "for there was sufficient certainty before, and the falsity came after the verity:" *Trapp's Case* (1590), 3 Leon. 235. And on motion for the amendment of a fine it was said "the present case differed from *Dowtie's* in the mode which that distinction required, for here the detailed true description came first," and the amendment was accordingly allowed: *Sidney, Demandant* (1815), 6 Taunt. 177. And Preston lays down the rule in the following terms: "It is a general rule that when the first and material circumstances of the description are true a false addition does not affect the validity of the grant:" 2 Prest. Conv. 449 (3rd ed.).

But this not now law.

In commenting on *Dowtie's Case*, Hobart says (*Stukeley* v. *Butler* (1614), Hob. 171): "But where it is added in that case that the Court was of opinion that if he had begun with the tenure of G., which was true, and ended with the parish mistaken, that the grant had been good by the rule *utile per inutile non vitiatur:* I hold it plain contrary; for the several circumstances and descriptions circumscribe and ascertain the grant. And it is a good rule, *incivile est nisi tota sententia perspecta de aliquâ parte judicare:*" and he cites *Doddington's Case* (1594), 2 Rep. 32. See also Shep. Touch. 247; 4 Cru. Dig. tit. xxxii. ch. 21, s. 59; *Windham* v. *Windham* (1581), Dyer, 376 b, where the mistaken part of the description preceded the correct part; and *Jack* v. *M'Intyre* (1845), 12 Cl. & F. 151; and *Rorke* v. *Errington* (1859), 7 H. L. C. 617, in both of which cases the misdescription was by omission in the first part of the description.

The limitation of the doctrine was maintained in argument in the Court of Appeal in *Cowen* v. *Truefitt*, [1899] 2 Ch. 309, when *Wrotesley* v. *Adams* (1558), Plowd. 187, at p. 191; *Doe* v. *Galloway*

(1833), 5 B. & Ad. 43 at p. 51, and Shep. Touch. 247, were the only authorities cited in favour of the limitation. The decision of the Court turned upon a different point, but the argument was dealt with in the judgments as follows:—

"I must, however, protest against the way in which the doctrine was stated by the appellants' counsel—that the maxim, '*Falsa demonstratio non nocet*,' only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous; it is a misapprehension:" per Lindley, M.R., *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309 at p. 311. "I agree, however, that the doctrine is not to be cut down as was suggested by the appellants' counsel, by saying that it is to be limited to cases where the false part of the description follows the true. That would be cutting down what is a rational and useful canon of construction:" per Jeune, P., *Ibid.* at p. 313. "I altogether reject the argument, as my learned brothers have done, that in applying the doctrine of *falsa demonstratio* it is material in what part of the sentence the *falsa demonstratio* is found. To adopt such an argument would be to reduce a very useful rule to a mere technicality:" per Rigby, L.J., *Ibid.* at p. 313.

General descriptions following clear descriptions pass only what is *ejusdem generis*.

Where a description of property, sufficiently clear to render it certain what is intended, is followed by a general description, introduced by the words "and also," or the like, it will be taken that the object of introducing the general description is to guard against any accidental omission; and the general description will in most cases be held to comprise such property only as is *ejusdem generis* as that comprised in the specific description.

"It is very common to put in a sweeping clause; and the use and object of it, in general, is to guard against any accidental omission; but in such cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned:" per Lord Mansfield, C.J., *Moore* v. *Magrath* (1774), 1 Cowp. 9 at p. 12.

"It is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general

words treated as referring to matters *ejusdem generis* with such class:" per Pollock, C.B., *Lyndon* v. *Standbridge* (1857), 2 H. & N. 45 at p. 51, a case on a statute.

Examples.

Lease.

Lease by a bishop of a manor house, of the site thereof, and of certain particular closes and demesnes, by particular names, and of all other his lands and demesnes. *Held*, that ancient park and copyhold land did not pass by the latter general words: *Lord North* v. *Bishop of Ely* (1575), cited 1 Bulst. 100.

Creditors' deed.

Assignment to creditors of "all and singular the household furniture, plate, linen, and china, stock-in-trade, goods, and merchandise, debts, sums of money, bills, notes, and securities for money, and all other the estate and effects whatsoever and wheresoever, of or to which A. was then possessed or entitled." *Held*, not to pass a contingent interest under a will: *Pope* v. *Whitcombe* (1825), 3 Russ. 124; followed in *Re Wright* (1852), 15 Beav. 367.

Deed declaring uses of recovery.

The C. property consisted of a mansion house and thirteen fields, and two mills with the lands belonging thereto. The tenant in tail, by deed declaring the uses of a recovery, recited his intention to convey the property thereinafter particularly mentioned, and he conveyed "all those the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of C.; And also those fields, closes, pieces, or parcels of land or ground and hereditaments (eight in number), commonly called or known by the several names, &c. (naming them), being parts and parcels of the demesne lands of C. in the holding or occupation of T. M., together with all and singular houses, outhouses, edifices, buildings, &c., lands, meadows, &c., hereditaments and appurtenances whatsoever, to the said capital messuages, tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken or known for as (*sic*, *quaere*, taken for, or known as) part, parcel, or member thereof, or appurtenant thereto, or to any part or parcel thereof." *Held*, that the previous particular enumeration in the deed confined the operation of the subsequent general words, and that the mansion house and eight fields only passed by the deed: *Doe d. Meyrick* v. *Meyrick* (1832), 2 Cr. & Jer. 223; 2 Tyr. 178.

Voluntary settlement.

By indentures of lease and release, reciting that B. was entitled to a share in specified freeholds and leaseholds, and that he proposed to assign over all his interest in the aforesaid premises, and in such

other property situate in Great Britain or Ireland, whether real or personal, as he might at the time of executing the indenture be entitled to, for the benefit of his sisters, B. released his undivided share in specified freeholds to the trustee and his heirs, and assigned to the trustee his undivided share in the leaseholds, "and all other the property situate in Great Britain or Ireland or any part thereof, whether real or personal," to which he was then entitled, upon certain trusts for the benefit of his sisters. B. was at the time of executing the deed entitled to a share of a freehold house not mentioned in the deed. *Held*, that it did not pass, because the general words had reference to the leaseholds only: *Doungsworth* v. *Blair* (1837), 1 Keen, 795; 6 L. J. N. S. Ch. 263.

Mortgages.

A. being seised of a manor and other real estate in the county of M., mortgaged the last-mentioned real estate to B.; by a subsequent deed he mortgaged to C. "all the hereditaments and premises comprised in the previous mortgage, and all other the lands, tenements, and hereditaments (if any) in the county of M.," of which he was seised. *Held*, that the manor did not pass: *Rooke* v. *Kensington* (1856), 2 K. & J. 753.

Assignment by way of mortgage of "all and every the household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels and effects, now being, or which shall hereafter be in, upon, or about the messuage, &c., and all other the personal estate whatsoever" of the mortgagor. *Held*, not to pass the lease of the house in which the goods were: *Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678.

Charge of annuity.

Trustees, who had a power to raise money by sale or mortgage, and to manage and receive rents, were directed to apply the "moneys to be raised or received as aforesaid," in or towards payment, &c., of certain mortgage and other debts, and after providing for keeping down the interest on the debts out of "the rents and profits and other moneys in their hands," they were directed to pay an annuity out of the "rents or profits or any other moneys held by them on the trusts of these presents." *Held*, that the annuity was charged on income only, as the words "other moneys" must be restricted according to the rule, and would apply to fines and small things in the nature of income, not being exactly rents and profits: *Clifford* v. *Arundell* (1859), 27 Beav. 209; on appeal, (1860), 1 D. F. & J. 307.

Right of resumption.

A lease contained power to the landlord to take possession of any part of the land demised if required by him "for the purpose of building, planting, accommodation or otherwise." *Held*, that the

words "or otherwise" were to be restricted to purposes *ejusdem generis*, and therefore did not authorise the landlord to take possession of the land for the purpose of selling it to a railway company: *Johnson* v. *Edgware, &c., Ry. Co.* (1866), 35 Beav. 480.

Power of attorney.

A power of attorney "for the purposes of exercising for me all or any of the powers and privileges conferred" by a partnership deed "and generally to do execute and perform any other act . . . in or about my concerns engagements and business of every nature and kind whatsoever," was held to be restrained to partnership matters, so that the attorney could not dissolve the partnership and assign the principal's share therein: *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422; *Jacobs* v. *Morris*, [1901] 1 Ch. 261; [1902] 1 Ch. 815.

Advowson.

A conveyance of all and singular the manors, messuages, farms, lands, hereditaments and premises described in the schedule thereunder written, and all other the freehold hereditaments of him, the said G. J. J., situate in the several parishes of D. W. and C., in the county of Y., with the appurtenances, was held not to include the advowson of the parish church of D.: *Crompton* v. *Jarratt* (1885), 30 Ch. D. 298.

Fixtures.

So in a covenant to deliver up certain landlord's fixtures and all other fixtures and things at the expiration of a lease, it was held that trade fixtures, not being *ejusdem generis* as the fixtures enumerated, were not included in the covenant: *Lambourn* v. *McLellan*, [1903] 2 Ch. 268; following *Bishop* v. *Elliot* (1855), 11 Exch. 113.

Copyholds.

On the other hand a strip of copyhold land was held to pass by a conveyance of two fields containing about 22 acres, but the description was helped both by the acreage and the boundaries given in the deed: *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

Reversion and estate in possession.

A reversion is *ejusdem generis* as an estate in possession within the meaning of the rule: *Doe* d. *Pell* v. *Jeyes* (1830), 1 B. & Ad. 593. But a reversion was held not to pass where if it had passed it would have been *ipso facto* forfeited: *Re Waley* (1855), 3 Drew. 165.

Context.

The context may readily show that the rule is not to be applied.

Creditors' deed.

In *Ringer* v. *Cann* (1838), 3 M. & W. 343, where the words were nearly the same as in *Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678, stated *supra*, p. 229, it was held that the lease passed, on the grounds, first, that from the nature of the transaction (it being a creditors' deed), the object must have been to pass everything of value; and secondly, that the deed contained a provision that the assignees should pay the rent for a limited period.

Exceptions.

There are two exceptions to this rule.

First: where among general words something not *ejusdem generis* is mentioned by way of exception, this indicates that the general words are not to be restricted.

Exception of things not *ejusdem generis.*

An assignment to creditors by a debtor of "all his stock-in-trade, book and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and family. *Held*, to pass a contingent interest, on the ground that the exception of the wearing apparel showed that it was intended that all the assignor's property with that exception was intended to pass: *Ivison* v. *Gassiot* (1853), 3 D. M. & G. 958.

Anderson v. Anderson. 1895 1. Q. B. 749.

Second: "If the particular words exhaust a whole genus, the general," [*i.e.*, "collective,"] "words must refer to some larger genus:" per Willes, J., *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313 at p. 315; citing *Reg.* v. *Payne* (1866), L. R. 1 C. C. R. 27.

If first description is exhaustive.

The rule has been applied to the construction of Acts of Parliament: see Maxwell on the Interpretation of Statutes, c. 11, s. 5 (3rd ed.), pp. 468 *et seq.*

Rule applied to statutes.

Certain kinds of carriers and travellers were specifically mentioned in two Acts of Parliament on the same subject, and the words "other persons whatsoever" also appeared. *Held*, that the special description had the effect of excluding carriers not mentioned: *Sandiman* v. *Breach* (1827), 7 B. & C. 96.

Acts imposing rates on inhabitants of any "land, house, shop, warehouse, vault, mill, or other tenement" in a parish. *Held*, that the vicar was not rateable in respect of his tithes as an "other tenement:" *The Queen* v. *Nevill* (1846), 8 Q. B. 452.

See also *East London Waterworks Co.* v. *Trustees for Mile End Old Town* (1851), 17 Q. B. 512; *Lyndon* v. *Standbridge* (1857), 2 H. & N. 45.

Where the terms of the description are general, and the instrument and mode of assurance are proper for conveying freeholds, *primâ facie*, freeholds only will pass.

Freeholds only pass where the assurance is proper to pass them only.

This is the rule laid down by Mr. Preston (Shep. Touch. 92), but the cases cited by him—namely, *Rose* v. *Bartlett* (1632), Cro. Car. 292; *Day* v. *Trig* (1715), 1 P. Wms. 286; *Knotsford* v. *Gardiner* (1742), 2 Atk. 450—are all cases on wills. In *Edwards and Denton's Case* (1610), Godb. 183; S. C. *sub nom. Turpine* v. *Forreyner*, 1 Buls. 99, a case on a deed, the Judges expressed their opinion that the leasehold interest did not pass, but the decision turned on another point.

It appears to be clear that, on the one hand, the conveyance will

not be held to pass leaseholds or copyholds where the result would be to create a forfeiture: Shep. Touch. 91; *Francis* v. *Minton* (1867), L. R. 2 C. P. 543; and that, on the other hand, it will pass leaseholds or copyholds where there are no freeholds which answer the description of the lands expressed to be conveyed: as in *Marshall* v. *Frank* (1717), Gilb. Eq. Rep. 143; Pre. Ch. 480; or where they have for some considerable time been holden with and deemed part of the estate described in the deed: *Doe* d. *Davies* v. *Williams* (1788), 1 H. B. 25.

Copyholds.

Where the conveyance was of "all and every the estate, right, title, property and interest" of and in certain lands, a copyhold strip was held to pass, but the decision was helped by the acreage and boundaries given in the deed: *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

Leaseholds passing as "personal property."

No general rule can be laid down as to whether leaseholds will pass by a general description of "personal property." The principal cases are *Ringer* v. *Cann* (1838), 3 M. & W. 343; *Doe* d. *Farmer* v. *Howe* (1840), 9 L. J. N. S. Q. B. 352; *Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678; *Hopkinson* v. *Lusk* (1865), 34 Beav. 215; *White* v. *Hunt* (1870), L. R. 6 Ex. 32; *Debenham* v. *Digby* (1873), 28 L. T. 170.

Mortgage sub-term.

An assignment, by the executors of a mortgagee of leaseholds by demise, of "all the benefit of the said mortgage" to one of themselves was held insufficient to pass the legal interest in the sub-term: *Re Beachey, Heaton* v. *Beachey*, [1904] 1 Ch. 67.

It is a presumption of law that—

Conveyance of land passes half soil of highway.

> A conveyance of land abutting on a highway, or a non-tidal river, passes the adjoining half of the highway, or of the river bed.

Presumption may be rebutted.

The presumption may be rebutted, but it is not rebutted (i.) by the land being described as containing an area which can be satisfied without including half the road or river bed; (ii.) by the land being described as bounded by the road or river bed; (iii.) by the land being referred to as coloured on a plan, whereon the half of the road or river bed is not coloured; (iv.) by the grantor being owner of the land on both sides of the road or river; or (v.) because subsequent events not contemplated at the time of the grant show it to have been very disadvantageous to the grantor to have parted with the half of the road or river bed, but which if contemplated would probably have induced him to reserve it.

"It appears to me that a conveyance of land, described as abutting on a road, passes a moiety of the soil of the road, unless there be something in the context to exclude it. It is like the case put in Rolle's Abridgment, Graunts (P.), pl. 6, 'Si home grant un messuage vocatum Falstolfe Place, *prout undeque includitur aquis*, per ceux parolls le soile del motes en que le ewe est passera; P. 9 Car. B. R. (1633), enter *Stint* & *Morgan*, per Curiam, resolve sur un trial al barr.' And this received the assent of Chief Baron Comyns; see Com. Dig., Grant (E. 6):" per Willes, J., *Simpson* v. *Dendy* (1860), 8 C. B. N. S. 433 at p. 472.

Abuttals insufficient.

"I am of opinion that, where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance:" per Erle, C.J., *Berridge* v. *Ward* (1861), 10 C. B. N. S. 400 at p. 415.

Measurement insufficient.

"I quite agree that where there is a plot of land conveyed adjoining to a road or river, the *primâ facie* presumption is, that up to the *medium filum aquae* or *viae*, whichever it may be, belongs to the purchaser. And it is not enough to rebut that presumption to say that it is designated as adjoining to or abutting on that road or river, and this even if there was mention of the acreage. But . . . it has always been held to be enough" [*i.e.*, to rebut that presumption] "when there is anything to show that it was not the intention to convey any part of the road:" per Blackburn, J., *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16 at p. 24.

Abuttals insufficient.

"The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *primâ facie* presumption is that the parties intended to include in the grant a moiety of the road or of the river bed, as the case may be; and that such general presumption ought to prevail, unless there is something to indicate a contrary intention; . . . and the authorities seem further to establish that this general presumption is not to be considered as rebutted by this circumstance alone, that the subject of the grant is described as abutting on or bounded by the road or river, or that the quantity of land specifically described as granted is satisfied without including the half of the road or river, or that the grant refers to a map or plan in which the half of the road or river is not included. To rebut the general presumption,

Reference to map insufficient.

there must be something in the language of the grant indicating an intention to exclude [or] something in the subject-matter or in the surrounding circumstances from which such an intention may reasonably be inferred:" per Fitzgerald, J., *Dwyer* v. *Rich* (1871), Ir. Rep. 6 C. L. 144 at p. 149; and see per Lord Cranworth, C., *Wishart* v. *Wyllie* (1853), 1 Macq. 389, which was apparently not a case on the construction of a deed.

Subsequent events insufficient.

"There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply, but in my opinion it is not sufficient that circumstances which afterwards occur show it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road:" per Cotton, L.J., *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 133 at p. 145.

Ownership of both banks insufficient.

"The grant is of land delineated in a plan and therein coloured pink and described by quantity and as abutting on the north on the river Aire. Neither the colouring on the plan nor the quantity named includes the half bed of the river. When we come to apply the ordinary and well-settled rules of law to that conveyance, we find it settled by authority which it is impossible for us to ignore or overrule, that those circumstances as to colouring and quantity do not alone prevent a moiety of the bed of the river from passing:" per Lindley, L.J., *Ibid.*, at p. 152, in which case the grantor was, at the time of the grant, owner of both banks of the river.

Cases where presumption rebutted.

Grant to a railway company.

The presumption was rebutted in a case where the conveyance was to a railway company purchasing under their statutory powers on the grounds that before the conveyance the company had in their deposited plans and book of reference treated the road as being vested in turnpike trustees, and that "the conveyance exactly carried out that view of the case:" *The Marquis of Salisbury* v. *The Great Northern Ry. Co.* (1858), 5 C. B. N. S. 174.

Market place.

The presumption was rebutted in the case of The Briggate, Leeds, which is a very wide street in which fairs and markets (for which tolls were received) had been used to be held, and in respect of laying pipes and of encroachments in which, the lords of the manor had received rents and fines: *Beckett* v. *Corporation of Leeds* (1872), L. R. 7 Ch. 421.

Building estate.

The presumption was rebutted in a case where the land sold formed part of a building estate, and the plots sold were "pointedly and carefully marked out so as to include no part of the road at

all and separated from it by a strong line:" *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16; but this case was reversed on appeal ((1875), L. R. 10 Q. B. 203) on a different point, and no opinion was given on the correctness of the decision on the point stated.

Intended roads.

The presumption was rebutted in a case where the conveyance was of a plot of land laid out for building and the road in question was described in the conveyance as an intended road, on the ground that it was obviously necessary that the grantor should retain the soil of the intended road in order that he might construct the road and dedicate it to the public: *Leigh* v. *Jack* (1879), 5 Ex. D. 264.

Grassy lane.

The presumption was also rebutted where the road, which was separately numbered in the ordnance map, and was a grassy lane in which were some trees, was not included in the schedule to the conveyance, which referred to the numbers on the ordnance map, and on evidence that the grantee had paid for the trees on the land, but not for those growing in the road: *Pryor* v. *Petre*, [1894] 2 Ch. 11.

Fishery.

The presumption was also rebutted, where it was proved that at the date of the conveyances a fishery in the river had been for many years and still was in lease to tenants as a separate tenement: *Duke of Devonshire* v. *Pattinson* (1887), 20 Q. B. D. 263; and where the grant was an inclosure award and there was at the date of the award a several fishery in the river let as a separate tenement, and there was no evidence that the tenants had any right of fishing or commonable right over the bed, which consequently did not form part of the wastes: *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554; [1898] 2 Ch. 358, in which case an opinion was expressed that the presumption does not apply to awards under Inclosure Acts unless it is shown that the bed of the river or half the bed is part of the waste of the manor over which the tenants have rights of common, per North, J., [1897] 2 Ch. at p. 568, per Lindley, M.R., [1898] 2 Ch. at p. 366, per Chitty, L.J., *Ibid.*, at p. 371, and per Collins, L.J., *Ibid.*, at p. 375; but see to the contrary the *dictum* in the judgment of Lindley, L.J. in *Hindson* v. *Ashby*, [1896] 2 Ch. 1 at p. 9; and cf. *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347, a case on a private Inclosure Act.

Inclosure awards.

Islands.

The presumption so far as regards river beds only applies to land covered by water. There is no presumption that ancient islands pass, and in cases where there are such islands the middle

of the river bed is the *medium filum* between the shore and the island: *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347.

Lakes.

The presumption seems not to apply to inland navigable lakes, at least in Crown grants: *Bloomfield* v. *Johnson* (1867), I. R. 8 C. L. 68.

Tidal rivers.

There is no presumption that the ownership of the bed of a tidal river goes with the ownership of the adjoining soil, and therefore in Crown grants of land on tidal rivers, *primâ facie* the boundary is high-water mark, though evidence might show that the soil between high and low-water mark, or the bed below low-water mark, passed by the description of the land: see Coulson and Forbes on the Law of Waters, p. 71 (2nd ed. p. 81).

Streets in towns.

The presumption applies to streets and roads in towns as well as elsewhere: *Re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659; *London and North Western Ry. Co.* v. *Westminster Corporation*, [1902] 1 Ch. 269; [1904] 1 Ch. 759; notwithstanding the doubt expressed on this point in the head-note to *Beckett* v. *Corporation of Leeds* (1872), L. R. 7 Ch. 421, the judgments in which case, however, afford but slight grounds for such doubt.

Rights of local authorities.

And the statutes by which streets are vested in local authorities vest in them "such property only as is necessary for the control, protection and maintenance of the street as a highway for public use:" per Lord Herschell, *Mayor, &c., of Tunbridge Wells* v. *Baird*, [1896] A. C. 434 at p. 442; therefore, neither does the sub-soil vest in them *usque ad inferos: Ibid.*; nor the air above *usque ad coelum: Finchley Electric Light Co.* v. *Finchley Urban District Council*, [1903] 1 Ch. 437.

Pathway.

The presumption applies to a pathway as well as a road: *Berry and Goodman's Case* (1588), 2 Leon. 147, where it is stated that "the jury found that one side of the pathway was the land of the parson of the church, and the other side the churchyard, and prayed the opinion of the Court therein, to whom the interest of the pathway did belong; to which it was said by the Court that that ought to be found by the verdict, for although that both be the freehold of the parson yet the soil of the pathway might be conveyed by an express grant unto another. But the Court seemed to incline that the soil of the pathway did belong to him who had the lands on both sides, and that is the case as well of a highway as of a pathway," which must mean that the ordinary presumption applies.

The presumption applies to private as well as public roads. Private roads.

"The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property, and it is based upon this supposition—which may be more or less founded in fact, but which at all events has been adopted—that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose. I think that is an equally convenient and reasonable principle whether applied to a public or to a private road:" per Cockburn, C.J., *Holmes* v. *Bellingham* (1859), 7 C. B. N. S. 329 at p. 336; 29 L. J. C. P. 132 at p. 134, which, however, is not a case on the construction of a deed.

The same principle was asserted in *Smith* v. *Howden* (1863), 14 C. B. N. S. 398; also not a case on construction.

The presumption applies to a Crown grant, at any rate in the colonies: *Lord* v. *Commissioners of the City of Sydney* (1859), 12 Moo. P. C. 473. Crown grants.

"The general law, as I have stated it" (*sc.* that a grant of land on the bank of a river passes half the soil of the bed), "is not a law which relates to freehold property only. It is a law by which you ascertain the parcel of a grant. It does not matter whether the land is copyhold, freehold, or leasehold:" per Kay, J., *Tilbury* v. *Silva* (1890), 45 Ch. D. 98 at p. 109. See *infra*, p. 239. Copyholds.

The presumption that the soil to the middle of the highway belongs to the owner of the adjoining close applies to leaseholds: see per Holroyd, J., *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304 at p. 307; 9 D. & R. 908. Leaseholds.

A lease of houses in a street containing no express demise of the soil *ad medium filum viae*, was held to include the soil *ad medium filum*, so that the demised houses could be said to be contiguous to the houses on the opposite side of the street, construing "contiguous" strictly as "touching:" *Haynes* v. *King*, [1893] 3 Ch. 439. But the question was treated as being an open one in *Mappin Brothers* v. *Liberty & Co.*, [1903] 1 Ch. 118, where it was held that if there was such a presumption it was rebutted. Leases.

Where it is shown that of the two owners of lands abutting on either side of the highway, one is owner of more or less than one-half in width of the soil of the highway, then the presumption is that by his conveyance such owner grants the whole of that part of If grantor owns more than half.

the soil of the highway which belongs to him: *In re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659.

Small strips of uninclosed land.

The same presumption applies to small strips of uninclosed land lying between the land conveyed and the highway. "The ordinary presumption of law, as appears from the cases, is that small strips of land lying between old inclosures and the highway belong to the owners of the adjoining old inclosures. . . . Now the presumption of ownership being, as I have already observed, it is quite consistent with the language of this conveyance that it should vest in the grantee the soil of the road *usque ad medium filum*, for when the lord in whom was the freehold on both sides conveys the land on one side describing it as abutting on Hall Lane, the presumably right construction of the deed is that it passes to the grantee the soil *ad medium filum viae*:" per Erle, C.J., *Simpson* v. *Dendy* (1860), 8 C. B. N. S. 433 at pp. 469, 470; affirmed on appeal (1861), 7 Jur. N. S. 1058.

Copyholds or leaseholds.

"As to the property granted, a copyholder stands in the place of the lord, the leaseholder in the place of the lessor. It is very improbable that when a lease or grant is made of land near the high road, and there is between the highway and the land inclosed a small quantity of uninclosed land, of little or no use to the lord or lessor, that he should separate it from the rest, or reserve to himself such land. When a grant of land near to a road is made (even where it is inclosed and separated from the land adjoining), it appears to me that the *primâ facie* presumption is, that the land, on that side of the fence on which the road is, passes likewise with it. Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank. And if something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that, in point of law, is a part of the close on which the inclosure is made. If any grant of such land, being copyhold, had been made before the inclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the inclosure, and all the land, both within and without the inclosure, would, therefore, pass by those grants. It seems to me, therefore, that the rule that waste

Ditches.

land near a highway is to be presumed *primâ facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or a copyholder. In either case evidence may be given to rebut the *primâ facie* presumption:" per Holroyd, J., *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304 at pp. 307, 308; 9 D. & R. 908.

Strips near commons.

The presumption that uninclosed strips between the enclosures and the highway belong to the owners of the adjoining enclosures does not apply where such strips are contiguous to or communicate with open commons or larger pieces of uninclosed land, and it would probably be held that a grant by the owner of a close to which such a strip was adjacent would not pass the soil of such strip on the ground that the tenants of the manor had rights thereover, but there seems to be no case on the point.

"*Primâ facie* the presumption is that a strip of land, lying between a highway and the adjoining close, belongs to the owner of the close; as the presumption also is that the highway itself, *ad medium filum viae*, does. But the presumption is to be confined to that extent; for if the narrow strip be contiguous to, or communicate with, open commons, or larger portions of land, the presumption is either done away or considerably narrowed:" per Gibbs, C.J., *Grose* v. *West* (1816), 7 Taunt. 39 at p. 41; see also *Simpson* v. *Dendy* (1860), 8 C. B. N. S. 433, affirmed on appeal (1861), 7 Jur. N. S. 1058.

Modern grant by copy.

Although the presumption, that the soil to the middle of the highway belongs to the owner of the adjoining close, applies to ancient copyholds, a modern grant of an enclosure by the lord of a manor to hold by copy of court roll does not pass the soil of the highway, and it is doubtful whether it passes the soil of any intervening uninclosed strip of land.

"If the road existed at the time when the copyhold was first granted, viz., from time immemorial, the right of property in the road and the waste land adjoining might in that case have remained in the lord:" per Bayley, J., *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304 at p. 306; 9 D. & R. 908 at p. 909. And in the case of *Marquis of Salisbury* v. *Great Northern Ry. Co.* (1858), 5 C. B. N. S. 174, in which it was held that the soil of the road did not pass by a grant of roadside waste as copyhold, Williams, J., says (at p. 209): "We must look to the intention—Did he or did he not intend to pass to the grantee any rights which he had in the soil of the road? When we find that the

piece of land so granted was to be held of the lord as part of the copyhold of the manor, it seems to me to be impossible to say that it was intended to convey anything but the right to the very piece of land granted, the right to the soil of the adjoining road being left as it was."

Right of way by estoppel.

A grant or lease of land described as abutting on a new road or street passes to the grantee by estoppel a right of way over such new road or street for all its length: *Roberts* v. *Kerr* (1809), 1 Taunt. 495; *Harding* v. *Wilson* (1823), 2 B. & C. 96; *Espley* v. *Wilkes* (1872), L. R. 7 Ex. 298; *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165 at p. 173.

A grant of land, described asa butting on the seashore, but which in fact did not so abut, was held to give the grantee by estoppel access to the seashore at all points of the boundary: *Mellor* v. *Walmesley*, [1905] 2 Ch. 164.

Party-wall.

A grant, by the owner of two houses separated by a wall, of one of the houses passes an undivided moiety of such wall so that the owners of the houses are tenants in common thereof. "When the builder of two houses grants off one it is more reasonable to presume he grants the whole wall in undivided moieties than that he should leave to either party the power of cutting the wall in half. That would be the case if the houses were built by one and the same person. If two persons built at the same time the probability is that they would take a conveyance of an undivided moiety of the ground on which the wall was to be erected in order that the property might afterwards be kept in the same state:" per Bayley, J., *Wiltshire* v. *Sidford* (1827), 1 Man. & Ry. 404 at p. 407. "If a row of houses is built and the owner of the whole conveys separate houses to different persons, does not an undivided interest in the whole party-wall pass?" per Holroyd, J., *Ibid.* at p. 406.

A declaration in the grant that the wall is to be a party-wall makes the adjoining owners tenants in common: *Watson* v. *Gray* (1880), 14 Ch. D. 192.

A party-wall can be partitioned vertically and longitudinally: *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

The cases as to meaning of the word "party-wall" are: *Matts* v. *Hawkins* (1813), 5 Taunt. 20; *Cubitt* v. *Porter* (1828), 8 B. & C. 257; *Stedman* v. *Smith* (1857), 8 E. & B. 1; *Weston* v. *Arnold* (1873), L. R. 8 Ch. 1084; *Standard Bank of British South Africa* v. *Stokes* (1878), 9 Ch. D. 68; *Knight* v. *Pursell* (1879), 11 Ch. D. 412; and *Drury* v. *Army and Navy Auxiliary Co-operative Supply, Ltd.*, [1896] 2 Q. B. 271.

No special words are necessary for the creation of a profit *à prendre.*

Creation of profit *à prendre.*

A profit *à prendre* was created by the words, "Provided always, and it is hereby covenanted, granted, concluded and agreed, and A. and B. covenant and grant to and with C., his heirs and assigns, that it shall be lawful for C., his heirs and assigns, to take and dig, &c.:" *Lord Mountjoy's Case* (1582), Moore, 197; 1 And. 307; S. C. *sub nom. Huntingdon and Mountjoye's Case,* 4 Leon. 147; *sub nom. Mountjoy and Huntingdon's Case,* Godb. 17.

Mining.

A grant by deed of the exclusive right of fishing is a profit *à prendre* and not a mere licence: *Fitzgerald* v. *Firbank,* [1897] 2 Ch. 96.

Fishing.

A grant of a profit *à prendre* is *primâ facie* non-exclusive.

Profit *à prendre* is non-exclusive,

The chief authorities for this proposition are Co. Litt. 4 b; *Lord Mountjoy's Case* (1582), Moore, 197; 1 And. 307; S. C. *sub nom. Huntingdon and Mountjoye's Case,* 4 Leon. 147; *sub nom. Mountjoy and Huntingdon's Case,* Godb. 17; *Chetham* v. *Williamson* (1804), 4 East, 469; *Newby* v. *Harrison* (1861), 1 J. & H. 393 at p. 396; *Carr* v. *Benson* (1868), L. R. 3 Ch. 524 at p. 532; *Duke of Sutherland* v. *Heathcote,* [1891] 3 Ch. 504; [1892] 1 Ch. 475. But, notwithstanding the *dicta* in Co. Litt. 4 b, and in some of the reports of *Lord Mountjoy's Case* (*ubi sup.*), such a grant may be exclusive: *Harker* v. *Birkbeck* (1764), 3 Burr. 1556; *Wilson* v. *Mackreth* (1766), 3 Burr. 1824; the cases above referred to; and *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724 at p. 739.

but may be exclusive.

No special words are necessary for the creation of an easement.

Creation of easements.

"It is undoubted law that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable, are sufficient to effect that purpose:" per Lord Wensleydale, *Rowbotham* v. *Wilson* (1860), 8 H. L. C. 348 at p. 362, in which case it was decided that a right to injure the surface of land by underground workings was an easement. An easement was created by the words "A. grants and agrees with B., his heirs and assigns, that it shall be lawful for them at all times to have, &c.:" *Holms* v. *Seller* (1691), 3 Lev. 305.

Rights of way.

Many of the cases on the construction of deeds relating to rights of way are cases of so-called exception or reservation; but the construction of such reservations is similar to that of grants, for "it is to be observed that a right of way cannot in strictness be made the subject of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved*, using that word in a somewhat popular sense, to a lessor, as in the present case, is in strictness of law an easement newly created by way of grant from the grantee or lessee:" per Tindal, C.J., *Durham and Sunderland Ry. Co.* v. *Walker* (1842), 2 Q. B. 940 at p. 967.

Extent of rights of way depends on nature of road and purpose of grant.

The nature and extent of a right of way must, in the absence of express terms contained in the grant, depend on the nature of the road over which it is granted, and the purpose for which it is intended to be used.

"The grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way, that is, a right of way not only for people on foot, but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will, of course, depend on the circumstances surrounding, so to speak, the execution of the instrument. Now, one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road, with pavement on both sides, existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage, not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used or was actually used. Where you find a road constructed so as to be fit for carriages, and of the requisite width, leading up to a dwelling-house, and there is a grant of right of way to that dwelling-house, it would be a grant of a right of way for all

reasonable purposes required for the dwelling-house, and would include therefore the right to the user of carriages by the occupant of the dwelling-house if he wanted to take the air, or the right to have a waggon drawn up to the door when the waggon was to bring coals for the use of the dwelling-house. Again, if the road is not to a dwelling-house but to a factory or a place used for business purposes, which would require heavy weights to be brought to it, or to a wool warehouse, which would require bags or packages of wool to be brought to it, then a grant of right of way would include a right to use it for reasonable purposes sufficient for the purposes of the business, which would include the right of bringing up carts and waggons at reasonable times for the purpose of the business. That again would afford an indication in favour of the extent of the grant. If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five feet wide, over which a waggon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances showed that the right of way was a right for foot passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course, where you find restrictive words in the grant, that is to say, where it is only for the use of foot passengers, stated in express terms, or for foot passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law. *Primâ facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen or cattle, which is generally called a drift-way, or a general right of way for carts, horses, carriages, and everything else:" per Jessel, M.R., *Cannon* v. *Villars* (1878), 8 Ch. D. 415 at pp. 420, 421.

Not limited to purposes required at time of grant.

The question whether a right of way is limited to purposes for which access was required at the time of the grant to the land to which it is appurtenant, is one on which there has been much difference of opinion, but probably the better opinion is "that where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee is entitled, the grant is not to be restricted to access to the land for the purposes

for which access would be required at the time of the grant:" per Stephen, J., *Finch* v. *G. W. Ry.* (1879), 5 Ex. D. 254 at p. 261.

In the judgment in that case, *Allan* v. *Gomme* (1840), 11 A. & E. 759; *Henning* v. *Burnet* (1852), 8 Exch. 187; *Skull* v. *Glenister* (1864), 16 C. B. N. S. 81; *Williams* v. *James* (1867), L. R. 2 C. P. 577; *United Land Co.* v. *G. E. Ry. Co.* (1873), L. R. 17 Eq. 158; (1875), L. R. 10 Ch. 586; and *Newcomen* v. *Coulson* (1876–7), 5 Ch. D. 133, are all discussed. Cases which bear upon the question but are not discussed in *Finch* v. *G. W. Ry.* are *South Metropolitan Cemetery Co.* v. *Eden* (1855), 16 C. B. 42 at p. 57; *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166; *Wood* v. *Saunders* (1875), L. R. 10 Ch. 582, and *G. W. Ry.* v. *Talbot*, [1902] 2 Ch. 759.

Access to other closes.

The grantee of a right of way cannot use it for access to a close other than that for which it is granted: *Lawton* v. *Ward* (1696), 1 Ld. Raym. 75; *Henning* v. *Burnet* (1852), 8 Exch. 187; *Harris* v. *Flower* (1904), 91 L. T. 816; 74 L. J. Ch. 127; but if the land is not intended to be held as a separate property, but to be thrown into and to form part of a larger close, the right of way is appurtenant to the whole of such close: *Thorpe* v. *Brumfitt* (1873), L. R. 8 Ch. 650.

Right of way over railway.

And under a grant of right of way over a railway the grantee is only entitled to a right of way sufficient to make good the interruption which the construction of the railway causes by severance in the use and working of his own land, including any alteration and extension of that working or use which could or ought to have been contemplated by the parties at the time of the severance, and the owner is not entitled to use such right of way for the passage of goods and traffic brought on to his land from other places if such user substantially increases the burden of the easement as enjoyed at the date of the severance: *G. W. Ry.* v. *Talbot*, [1902] 2 Ch. 759.

Grant in gross.

A right of way can be granted in gross, and if so granted is a personal licence: *Ackroyd* v. *Smith* (1850), 10 C. B. 164; but where the close forming the terminus is granted by (and probably where it is mentioned in) the same deed, the right is appurtenant to the land so granted (or mentioned); "the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed: it is therefore a grant of a right of way to and from that triangular piece of ground:" per James, L.J., *Thorpe* v. *Brumfitt* (1873), L. R. 8 Ch. 650 at p. 655.

A grant to A., his heirs and assigns, that they, and the tenants and occupiers of Blackacre, of which A. was only tenant from year to year, might use a footway, does not cease on A.'s purchasing the freehold of Blackacre, but the right is thenceforth appurtenant to the fee of Blackacre: *Rymer* v. *McIlroy*, [1897] 1 Ch. 528. Where fee subsequently purchased.

Under a grant of a free and convenient way for the purpose of carrying coals, with liberty to make and lay causeways, the grantee has a right to lay down a framed waggon-way: *Senhouse* v. *Christian* (1787), 1 T. R. 560; or a railway: *Dand* v. *Kingscote* (1840), 6 M. & W. 174; see, however, *Neath Canal Co.* v. *Ynisarwed Colliery Co.* (1875), L. R. 10 Ch. 450; but under a grant of a right of way from A. to B. *along* a road, the grantee is not justified in making a road *across* the road: *Senhouse* v. *Christian, ubi sup.* Railways.

A reservation of a right of way on foot, and for horses, oxen, cattle and sheep, does not give a right to lead manure: *Brunton* v. *Hall* (1841), 1 Q. B. 792. Footway.

A reservation, in a lease of lands, of woods and mines, with power to cut down, work and carry away the same, "with free ingress, egress and regress, wayleave, and passage to and from the same, or to and from any other mines . . . and also all necessary and convenient ways, privileges, and powers whatsoever for the purposes aforesaid," only gives a right of making ways over the demised lands for the purpose of getting the excepted woods, mines and minerals: *Durham and Sunderland Ry. Co.* v. *Walker* (1842), 2 Q. B. 940.

A covenant in a deed that the owners and occupiers of certain lands should and might pass and repass over "and have the full use and enjoyment" of certain roads, "in as full, free, complete and absolute manner to all intents and purposes whatsoever as if the same were public roads," was held to entitle such owners to use the roads for laying gas-pipes therein: *Selby* v. *Crystal Palace District Gas Co.* (1862), 30 Beav. 606. Putting in pipes.

A grant of a right of way over a road which was in part formed and in part only staked out, was held to extend over the whole road and not only over the formed part: *Wood* v. *Stourbridge Ry. Co.* (1864) 16 C. B. N. S. 222. Where road formed in part only.

A lease of a dry dock with a right of way for the lessee, his workmen and servants, and all other persons or person by his authority over a roadway and passage, which was a strip of land twenty-three feet wide, fourteen feet of which was subsequently paved, was held to be confined to foot passengers: *Cousens* v. *Rose* (1871), L. R. 12 Eq. 366. Footway only.

Gateway.

A grant of certain land in the rear of a house approached by a gateway, passage, or tunnel, through and under that house, "together with the exclusive use of the gateway," the dimensions of which were given, entitles the grantee not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes, and probably gives him ownership of the space within the gateway: *Reilly* v. *Booth* (1890), 44 Ch. D. 12.

Extends to licensees.

The grant, in a lease, of a right of way to "the lessee, his executors, administrators and assigns, under-tenants and servants," extends to the licensees of the grantee lawfully going to and from the dominant tenement: therefore, where the lessee used the dominant tenement as a working-men's club, an injunction to restrain the members, honorary members, guests, visitors, officers and tradespeople of the club from using the way was refused: *Baxendale* v. *North Lambeth Liberal and Radical Club, Ltd.*, [1902] 2 Ch. 427.

Repairs.

The grant to one and his heirs of the liberty to make a sough or drain in the grantor's land passed, as incident thereto, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough: *Hodgson* v. *Field* (1806), 7 East, 613.

Exceptions and reservations distinguished.

> "Note a diversity between an exception (which is ever a part of the thing granted and of a thing *in esse*), for which *exceptis*, *salvo*, *praeter* and the like be apt words; and a reservation which is always of a thing not *in esse* but newly created or reserved out of the land or tenement demised:" Co. Litt. 47 a; Shep. Touch. p. 80.

"A man upon his feoffment or conveyance cannot *reserve* to himself parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant:" Co. Litt. 142 a; Brooke's Abridgment, tit. Reservation, pl. 46; *Fancy* v. *Scott* (1828), 2 Man. & Ry. 335.

But with regard to reservations Lord Coke says: "Sometime it hath the force of saving or excepting. So as sometime it serveth to reserve a new thing, viz., a rent, and sometime to except part of the thing *in esse* that is granted:" Co. Lit. 143 a; *Anon.* (1536), Dyer, 19 a, pl. 110; but see the criticism on the passage in Coke, per Lord Denman, C.J., *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705 at p. 745.

Timber trees, mines and quarries are exceptions: *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197 at p. 207; *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705 at pp. 743, 746; rent, heriot, suit of court and suit of mill are reservations: *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705; hawking, hunting, fishing and fowling, and rights of way are neither exceptions nor reservations, but privileges regranted by the grantee: *Doe* d. *Douglas* v. *Locke* (1835), 2 Ad. & El. 705 at p. 743; *Wickham* v. *Hawker* (1840), 7 M. & W. 63; *Durham and Sunderland Ry. Co.* v. *Walker* (1842), 2 Q. B. 940 at p. 967; and therefore if the deed be executed by the grantee such privileges can be granted to persons other than the grantors: *Wickham* v. *Hawker* (1840), 7 M. & W. 63; but not if the deed be not executed by the grantee: per Stirling, J., *Thellusson* v. *Liddard*, [1900] 2 Ch. 635 at p. 645.

What are exceptions.

Reservations.

Privileges.

An exception of "mines" or "coal or limestone" is an exception not only of the minerals but also of the space which they occupy: *Proud* v. *Bates* (1865), 34 L. J. Ch. 406; *Duke of Hamilton* v. *Graham* (1871), L. R. 2 H. L. Sc. 166.

Mines include space which they occupy.

An exception of mines must be clearly expressed. Thus, "saving and reserving full and free liberty to search for, get, dig, drain, and carry away minerals found within the lands granted" do not, without a context to the contrary, operate as an exception of the minerals out of the grant: *Duke of Sutherland* v. *Heathcote*, [1891] 3 Ch. 504; [1892] 1 Ch. 475 at p. 483, where Lindley, L.J., says that "unless a clear intention to except the minerals can be established" the decision of the House of Lords in the *Duke of Hamilton* v. *Dunlop* (1885), 10 Ap. Ca. 813, on appeal from Scotland, which appears to be directly contrary, "is of no assistance."

Exceptions must be clear.

Where A. granted certain lands excepting all mines of coal with liberty to enter and sink pits for getting all such coal except as to lands within 150 yards of any messuage and except any homestead. *Held* that the second exception only applied to the liberty to sink pits: *Bowler* v. *Wolley* (1812), 15 East, 444.

Where there was a grant of lands excepting and reserving all mines of coal, together with sufficient wayleave and stayleave to and from the said mines, together with liberty of sinking and digging a pit and pits for the winning of coal, it was held that under the reservation of the liberty of sinking pits, the right of erecting steam engines and other machinery necessary for drawing the coals from the pits and draining the mines, with all proper accessories, passed as incident thereto: *Dand* v. *Kingscote* (1840), 6 M. & W. 174 at p. 196.

Exceptions include necessary powers,

Where one made a lease of lands excepting the trees, "it was resolved that when the lessor excepted the trees and afterwards had an intention to sell them the law gave him and them who would buy power as incident to the exception to enter and show the trees to those who would have them; for without sight none would buy and without entry they could not see them:" *Liford's Case* (1614), 11 Rep. 46 b at p. 52 a.

but not conveniences.

But a lease of land with power to open and work mines does not imply, as a necessary incident thereto, power to fell timber to make utensils for use in the mines, for the principle "is to be understood of things incident and directly necessary:" *D'Arcy* v. *Askwith* (1617), Hob. 234.

Wreck.

If a man either by grant or prescription have a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it: *Anon.* (1704), 6 Mod. 149.

The feoffor enfeoffed the feoffee of certain closes, except and reserved to the feoffor his heirs and assigns all the coals in the closes, together with free liberty for the feoffor and his heirs and his and their assigns and servants during the term that the feoffor and his heirs should be owners of the demesne lands of F. to sink and dig pits, &c., it was held that the right incident to the exception and reservation of the coals to the feoffor, his heirs and assigns was not limited by the express liberty contained in the deed, even if such express liberty was restricted to the time during which the demesne lands of F. continued in course of descent in the feoffor and his heirs, which it was not: *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197.

CHAPTER XIV.

GENERAL WORDS—ALL THE ESTATE CLAUSE.

Appendants and Appurtenants pass by Grant of Principal: Appendant and Appurtenant Distinguished: Extinguished Easements are not Appurtenant: "Appurtenances" only passes what is Appurtenant: But Context may enlarge Meaning: Recreation of Rights of Common: General Words only grant what Grantor has at time of Grant: Grant of Part of Tenement passes Continuous and Apparent Easements necessary for Grantee; Right of Way over Formed Road; and Way of Necessity: Way of Necessity always remains the same: No Reservation implied for Grantor except Way of Necessity; Way over Formed Road; and Reciprocal Easements: Grantor cannot derogate from Grant: Contemporaneous Sales: "All the Estate" Clause: Where Grantor is Trustee and has also a Beneficial Interest.

A CONVEYANCE of land always passed all that which was legally appendant or appurtenant thereto, but inasmuch as there often exist many privileges, easements, or *quasi*-easements enjoyed with the land which are not legally appendant or appurtenant thereto, it was usual, prior to the coming into operation of the Conveyancing and Law of Property Act, 1881, to insert in conveyances of land after the parcels divers "general words" for the purpose of conveying all appurtenances, easements, and *quasi*-easements which were enjoyed with the land; but it is now unnecessary, and indeed is no longer usual, to insert such words, as by sect. 6 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a conveyance of land executed after 31st December, 1881, is deemed to include and operates to convey with the land, unless a contrary intention is expressed in the conveyance, the divers particulars mentioned in that section, such particulars being an enumeration of the general words which it had been previously usual to insert in conveyances.

General words no longer inserted in conveyances.

It was, even prior to the passing of the Conveyancing and Law of Property Act, 1881, unnecessary to insert any such general words for the purpose of passing what was strictly appendant or appurtenant to the land, for, as above stated—

Things appendant or appurtenant pass by conveyance of principal.

> That which is legally appendant or appurtenant passes by the conveyance of the principal, without the words "with the appurtenances," or the like: Co. Litt. 121 b; Shep. Touch. 89; *Whistler's Case* (1612), 10 Rep. 63 a.

"The incident, accessory, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *è converso;* for the principal doth not pass by the grant of the incident, &c. *Accessorium non ducit, sed sequitur, suum principale* (Co. Litt. 152 a). And therefore by the grant of a reversion without naming the rent, a reversion after an estate tail, for life, or [for] years, and the rent reserved upon the estate, will pass, so as the tenant attorn to the grant [attornment is no longer necessary]; but by the grant of the rent the reversion will not pass. So by the grant of a manor, the Court Baron thereunto belonging will pass; by the grant of a house, or ground, the ways [and other conveniences, as garden, &c.] thereunto belonging do pass; by the grant of arable land, the common appendant thereunto will pass; by the grant of mills, the waters, flood-gates, and the like that are of necessary use to the mills do pass [also a stone belonging to the mill, though separated from the mill to be new worked]; by the grant of a house, the estovers appendant thereunto will pass; by the grant of a manor, the advowsons appendant, and villains regardant thereunto, pass [but they may be severed by exception]; by the grant of a fair, the Court of Piepowders will pass; by the grant of homage, or rent, the fealty will pass; and by the grant of escuage, homage and fealty will pass:" Shep. Touch. 89.

Appendant and appurtenant distinguished.

"Appendant is any inheritance belonging to another that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another; a word indifferent both to things appendant and things appurtenant. The quality and nature of the things do make the difference. . . . Appendants are ever by prescription; but appurtenants may be created in some cases at this day. As if a man at this day grant to a man and his heirs common

in such a moor for his beasts levant or couchant upon his manor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his manor; by these grants these commons are appurtenant to the manor, and shall pass by the grant thereof:" Co. Litt. 121 b.

Commons.

Thus common appendant cannot, but common appurtenant can, be created by a modern grant. "It was laid down as far back as the twenty-sixth year of King Henry VIII., in a case which is reported as Case 15 in the Year Book for Trinity Term of that year, that common appendant cannot be created by a modern grant, and this proposition as far as I can discover has been accepted as law ever since. . . . At the same time and in the same case it was also laid down that common appurtenant may be created by a modern grant, and the cases of *Sacheverell* v. *Porter* (1637), W. Jones, 396, and *Cowlam* v. *Slack* (1812), 15 East, 108, are more recent authorities to that effect:" per Stirling, J., *Baring* v. *Abingdon*, [1892] 2 Ch. 374 at p. 378.

Appendants.

As to what can be "appendant" to another thing, see Co. Litt. 121 b, 122 a; *Tyrringham's Case* (1584), 4 Rep. 36 b; Viner Abr. *s.v.* "Appendant," A. and B.; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

Appurtenants.

To make an easement appurtenant to a piece of land, it is necessary that the grant should be by deed, for a grant by parol only does not make it strictly appurtenant. Thus, Blackburn, J., in discussing the difference between the right to use a road granted by deed and such a right granted merely by parol, says: "In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant:" *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360 at p. 368; and any easement which, though at one time appurtenant to land, has become extinguished by unity of possession, is no longer strictly appurtenant to the land, and can only be passed by words of express grant or by words which would be sufficient to create it if it had never been appurtenant, *e.g.*, "used and enjoyed with the land."

Easements once extinguished are not appurtenant.

"We all agree that where there is unity of seisin of the land and of the way over the land in one and the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and the way, and that after such extinguishment or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word:" per Tindal, C.J., *James* v. *Plant* (1836), 4 A. & E. 749 at p. 761.

"With the appurtenances" only passes true appurtenances.

A grant of land "with the appurtenances," or other equivalent expression will, in general only pass what is strictly appurtenant.

Land not appurtenant to land.

It therefore will not in general pass other land, as "land may not be appurtenant to a messuage in the true and proper definition of an appurtenance:" *Hill* v. *Grange* (1556), Plow. 164 a at 170 a; *Anon.* (1564), Owen, 31, where a distinction is drawn between a demise of the site of a manor with all the lands appurtenant to the said manor, and a similar demise with all the lands appertaining to the said site—in the former case all the demesne lands pass, in the latter nothing but the site of the manor passes.

Examples.

Lands.

An adjoining building, not accounted parcel of a house, though held with it for thirty years, *Held* not to pass: *Bryan* v. *Wetheread* (1625), Cro. Car. 17. A kiln, *Held* not to pass: *Archer* v. *Bennett* (1664), 1 Lev. 131; 1 Sidf. 211; 1 Keb. 736. Demise of a messuage "with all rooms and chambers with the appurtenances belonging or in anywise appertaining thereto," *Held* not to include a room which once formed part of the messuage, but had been separated from it and was not at the time of the demise occupied with it: *Kerslake* v. *White* (1819), 2 Starkie, 508. An adjoining stable, though used with a house for many years, *Held* not to pass: *Maitland* v. *Mackinnon* (1862), 1 H. & C. 607.

Allotments in lieu of commons.

Waste lands were inclosed under an Inclosure Act and the rights of common thereover were extinguished and lands allotted to the owner of a farm in lieu of such rights; afterwards the owner demised the farm "together with all commons, &c., and appurtenances thereto belonging or usually held or enjoyed therewith:" it was held that no right over the allotments passed to the lessee by reason of the general words in the lease: *Williams* v. *Phillips* (1881), 8 Q. B. D. 437.

Commons.

Common not strictly appurtenant, *Held* not to pass: *Grymes* v. *Peacock* (1609), 1 Buls. 17; *Baring* v. *Abingdon*, [1892] 2 Ch. 374. Common extinguished by unity of ownership, *Held* not to pass: *Saundeys* v. *Oliff* (1598), Moore, 467; and see further cases relating to common, *infra*, p. 254.

Ways.

Way not strictly appurtenant, *Held* not to pass: *Barlow* v. *Rhodes* (1833), 1 Cr. & M. 439; *Worthington* v. *Gimson* (1860), 2 El. & El. 618; but as to a right of way over a formed road, see *infra*, p. 260.

Contract for sale with appurtenances.

Under a contract for the sale of land "with the appurtenances," the purchaser is only entitled to insert in his conveyance such general words as he would have been entitled to insert before the

Conveyancing and Law of Property Act, 1881, and the vendor is consequently entitled to limit the words which by sect. 6 of that Act would be deemed to be included in the conveyance: *Re Contract between Peck and School Board for London*, [1893] 2 Ch. 315; *In re Hughes and Ashley's Contract*, [1900] 2 Ch. 595. Under such a contract made before the Conveyancing Act, the purchaser was not entitled to rights of way not strictly appurtenant: *Bolton* v. *Bolton* (1879), 11 Ch. D. 968.

Context may enlarge meaning.

But the context may show that the word "appurtenances" or other equivalent expression, is used in a secondary sense of "usually held or enjoyed therewith."

Thus, though "land may not be appurtenant to a messuage by the true and proper definition of an appurtenance:" *Hill* v. *Grange* (1556), Plow. 164 a at 170 a; yet on a lease of a messuage "with all the lands to the said messuage appertaining" the word "appertaining" was "taken in the sense of 'usually occupied' with the messuage or 'lying to' the messuage, for when 'appertaining' is placed with the said other words it cannot have its proper signification as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void:" *Hill* v. *Grange* (1556), 1 Plowd. 164 a at p. 170 a; Dy. 130 b; and a similar decision was come to in the case of a grant from the Crown: *Gennings* v. *Lake* (1629), Cro. Car. 168.

Examples.

A conduit and the right to go upon another's land to mend it: *Guy* v. *Brown* (1601), Moore, 644; *Brown* v. *Nichols* (1603), Moore, 682; *Nicholas* v. *Chamberlain* (1606), Cro. Jac. 121; a garden, *Doe* d. *Norton* v. *Webster* (1840), 12 A. & E. 442; passed by a conveyance of a house "with the appurtenances:" 2 Wms. Saund. 400, note (2) (ed. 1871, vol. 2, p. 806, note (1)).

And in *Morris* v. *Edginton* (1810), 3 Taunt. 24, a demise of land with all ways belonging and appertaining was held to pass a right of way used by the lessor over land of his own. And "appurtenances" in the habendum of a deed was extended to include a way not strictly appurtenant by the words "usually held and enjoyed therewith" in the premises: *James* v. *Plant* (1836), 4 A. & E. 749; reversing S. C. *sub nom. Plant* v. *James* (1833), 5 B. & Ad. 791.

Re-creation of rights of common extinguished by unity of possession.

A grant of a tenement to which has formerly been appurtenant a right of common, which has been extinguished by unity of possession, does not re-create such

right of common if the words "commons thereto appurtenant" are alone inserted in the grant, but does re-create such right if the words "commons therewith heretofore used and enjoyed" are inserted in the grant.

In *Saundeys* v. *Oliff* (1598), Moore, 467; *Fort* v. *Ward* (1599), Moore, 667; *Marsham* v. *Hunter* (1609), Cro. Jac. 253; S. C. *sub nom. Massam* v. *Hunter*, Yelv. 189; *sub nom. Massam* v. *Hunt*, 1 Brownl. & G. 220; *sub nom. Marsam* v. *Hunter*, 2 Brownl. & G. 209; *sub nom. Marsum* v. *Hunter*, 1 Bulstr. 2; *sub nom. Darson* v. *Hunter*, Noy, 136; *Clements* v. *Lambert* (1808), 1 Taunt. 205; the word "appertaining" alone being used, no right of common was created; but in *Bradshaw* v. *Eyre* (1598), Cro. Eliz. 570; *Worledg* v. *Kingswel* (1601), Cro. Eliz. 794; 2 And. 168; *Grymes* v. *Peacock* (1609), Bulstr. 17; the words "heretofore used and enjoyed therewith" were used, and a right of common was created.

Since 1882.

In grants since 1882 the general words deemed to be included in the grant by sect. 6 (i.) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) which do not include the word "heretofore," are not sufficient to re-create the right unless it was actually enjoyed at the time of the grant: *Hall* v. *Byron* (1877), 4 Ch. D. 667, the general words in the grant in which case are indistinguishable from those in the Act.

Grant by copy.

A re-grant by copy, whether with or without any general words, of a copyhold tenement which has, by forfeiture or otherwise, become vested in the lord, of course vests in the tenant the customary rights of common: *Badger* v. *Ford* (1819), 3 B. & Ald. 153. But on the other hand the enfranchisement of a copyhold extinguishes all rights of common in the lord's lands: *Fort* v. *Ward* (1599), Moore, 667; *Marsham* v. *Hunter* (1609), Cro. Jac. 253; S. C. *sub nom. Massam* v. *Hunter*, Yelv. 189; *sub nom. Massam* v. *Hunt*, 1 Brownl. & G. 220; *sub nom. Marsam* v. *Hunter*, 2 Brownl. & G. 209; *sub nom. Marsum* v. *Hunter*, 1 Bulstr. 2; *sub nom. Darson* v. *Hunter*, Noy, 136; *Crowther* v. *Oldfield* (1704), Holt, 146; but in *Styant* v. *Staker* (1691), 2 Vern. 250, where the lord had enfranchised "with all commons thereto belonging or appertaining," it was held that the rights of common were not extinguished in equity. (But *quaere* whether the deed was not in fact rectified by inserting a grant of common: see the note at the end of the report.)

Enfranchisement.

Customary freeholds.

The release of seignorial rights over customary freeholds does not extinguish the rights of common: *Baring* v. *Abingdon*, [1892] 2 Ch. 374.

A grant by the lord of part of his demesne, "together with all . . . commons . . . thereto belonging," does not pass to the grantee any right of common, though the occupier of the land had as lessee of the lord been accustomed to exercise rights of common over the lord's wastes: *Baring* v. *Abingdon*, [1892] 2 Ch. 374; but a grant with similar general words to the tenant of the whole of the land occupied by him under a lease which included "reasonable common" was held to create a right of common, as the intention was necessarily to be inferred that the tenant should take in perpetuity whatever he had enjoyed under the lease: *Doidge* v. *Carpenter* (1817), 6 M. & S. 47.

Grant of demesne.

Grant of reversion on lease.

> "General words in a grant must be restricted to that which the grantor had then" [*i.e.*, at the time of granting or contracting, *infra*, p. 270] "the power to grant, and will not extend to anything that he may subsequently acquire:" per Mellish, L.J., *Booth* v. *Alcock* (1873), L. R. 8 Ch. 663 at p. 667; 42 L. J. Ch. 557.

General words, restricted to what grantor has at time of contract.

This principle applies also to all rights which are implied upon the grant of a tenement: *Beddington* v. *Atlee* (1887), 35 Ch. D. 317.

Thus, where a builder who had a contract for the grant to him of leases of divers plots of land, which, however, was not to be taken as creating a demise, took a lease of one plot and transferred it to the purchaser, it was held that such purchaser had no right to access of light over an adjoining plot of land which was subsequently to such transfer demised to the builder: *Quicke* v. *Chapman*, [1903] 1 Ch. 659.

Grant in 1872 by owner of two tenements, of one to P. "together with all ways to the said tenement now or *heretofore* held or enjoyed." Prior to 1852 the occupier of such tenement had used a formed private road, but in 1852 he built a wall which separated that tenement from the private road, and thenceforth did not use the private road. *Held*, that no right to use the private road passed by the grant: *Roe* v. *Siddons* (1888), 22 Q. B. D. 224.

And do not revive quasi easements long since disused.

> By the grant of part of a tenement, all those continuous and apparent easements over the part retained by the grantor, which are necessary to the enjoyment of the part granted, and have before and up to the time

Grant of part of a tenement passes continuous and apparent easements, which are necessary.

of the grant been used therewith, pass to the grantee: *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31.

Easement.

The word "easement" is not here used in its strict sense, for when the two parts of the tenement are in the same ownership, all the acts which the owner does are referred to his ownership: see per Fry, J., *Bolton* v. *Bolton* (1879), 11 Ch. D. 968 at p. 970. The word is here used to mean a right which would have been an easement if the several parts of the tenement had belonged to different owners.

Continuous easements.

"There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or [*sic, sed quaere,* "and easements which are"] in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only [*sic, sed quaere,* "and are not of necessity"] they do not pass, unless the owner, by appropriate language, shows an intention that they should pass:" per Erle, C.J., *Polden* v. *Bastard* (1865), L. R. 1 Q. B. 156 at p. 161; 7 B. & S. 130; 35 L. J. Q. B. 92; approved by Mellish, L.J., in *Watts* v. *Kelson* (1871), L. R. 6 Ch. 166 at p. 173.

Apparent easements.

By "apparent" easements are meant "not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject:" *Pyer* v. *Carter* (1857), 1 H. & N. 916 at p. 922.

Necessary easements distinguished from

By "necessary" is meant necessary for the enjoyment of the tenement in its existing state: *Pyer* v. *Carter* (1857), 1 H. & N. 916 at p. 922. It has been defined by Lord Campbell (*Ewart* v. *Cochrane* (1861), 7 Jur. N. S. 925; 4 Macq. Sc. Ap. 117 at p. 122) as "necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant" (*i.e.*, before the severance).

easements of necessity.

The word "necessity" as used in the phrases "ways of necessity" and "easements of necessity" has plainly a narrower meaning than the word "necessary" as used in the phrase "easements necessary to the reasonable enjoyment of the property conveyed." An easement of necessity means "an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property:" per Stirling, L.J., *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557 at p. 573; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17.

Where the drainage of a tan-yard ran into a cesspool in an adjoining garden, and the owner of both properties sold the tan-yard. *Held* that the right of drainage passed by the conveyance: *Ewart* v. *Cochrane* (1861), 7 Jur. N. S. 925; 4 Macq. Sc. Ap. 117. Drainage.

Where A. built a house and let it to B., and afterwards let the adjoining land to C., it was held that C. could not block up the windows of the house, for no person who claims the land under the builder can obstruct the lights, any more than the builder himself could, who cannot derogate from his own grant: *Palmer* v. *Fletcher* (1663), 1 Lev. 122; S. C. *sub nom. Palmer* v. *Fleshees*, 1 Sidf. 167, 227; *sub nom. Palmer* v. *Flessier*, 1 Keb. 553, 625, 794; reported to the contrary, *sub nom. Palmer* v. *Fleshees*, Sir Thos. Raym. 87. See also, to the same effect, *Cox* v. *Matthews* (1672), 1 Vent. 237, 239; *Compton* v. *Richards* (1814), 1 Price, 27. In the report of *Palmer* v. *Fletcher* in 1 Sidf. 167 it is said that if A. lets two adjoining plots for building to B. and C., and B. builds a house, and afterwards C. in digging his cellar makes B.'s house fall, B. has no action against C. The distinction between the two cases is that in the first case the *quasi*-easement had been used before the severance, and therefore passed by the grant; in the latter case the *quasi*-easement had not been so used and therefore did not pass. It may be doubted, however, whether the *dictum* is correct. See "Support" *infrà*, p. 258. Lights.

"If a man have a vacant piece of ground, and build thereupon, and that house has very good lights, and he lets this house to another, and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the nuisance of the lights of the first house, the lessee of the first house shall have an action upon the case against such builder, &c., for the first house was granted to him with all the easements and delights then belonging to it:" per Holt, C.J., *Rosewell* v. *Pryor* (1701), 6 Mod. 116; Holt, 500.

Where stables and land were conveyed, before 1882, by a grantor who retained the soil of a private road, on which the stables abutted, on to which doors in the stables opened, and over which windows in the stables looked, and the grantor claimed the right to obscure the windows and obstruct the road, his counsel abandoned the claim to obscure the windows, and Chitty, J., said, "where a house is granted, lights as enjoyed by the house at the time of the grant pass without any express words, or indeed any words whatever, which implies a grant of the lights beyond the term 'house'; and of course the same principle would apply in all its force to a

grant of stables:" *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D. 434 at p. 438.

The lights, however, must be existing as lights, and not mere holes in a skeleton carcase, which might be adapted for use as either doors or windows: *Glave* v. *Harding* (1858), 27 L. J. Ex. 286.

Watercourse.

The owner of a field in which there was a watering place for cattle supplied by a stream flowing through a place called the Hopyard, purchased the Hopyard, and then sold the field in which the watering place was. *Held*, that he could not obstruct the flow of water: *Sury* v. *Pigot* (1626), Pop. 166; Palm. 444; Tud. L. C. R. P. (4th ed.) 732; S. C. *sub nom. Surrey* v. *Piggot*, Noy, 84; Latch, 153; *sub nom. Shury* v. *Piggot*, 3 Bulstr. 339; *sub nom. Shewry* v. *Pigott*, Sir Wm. Jones, 145. See, to the same effect, *Canham* v. *Fisk* (1831), 2 Cr. & Jer. 126; 2 Tyr. 155; *Wardle* v. *Brocklehurst* (1860), 8 W. R. 241.

Where the owner of a property laid down pipes from a tank to cattle sheds, and afterwards sold the cattle sheds to the plaintiff, it was held that the defendant, who was a subsequent purchaser of the land with the tank, was not entitled to obstruct the pipes, and that the right to an unobstructed flow of water through the pipes passed to the plaintiff by implication without any words, and also by the general words, "waters, watercourses . . . with the same . . . used, enjoyed:" *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166.

Temporary watercourse.

But where the watercourse was an artificial millstream and pond at which the owner of the mill and an adjoining farm had watered his cattle, and afterwards the owner sold the farm, which abutted on, but did not include any part of, the stream or pond, it was held that no right, either by implied grant or under the general words incorporated in the conveyance by sect. 6 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), to have the flow of water maintained, passed to the purchaser of the farm, for the stream and pond were formed for the temporary purposes of the mill only: *Burrows* v. *Lang*, [1901] 2 Ch. 502.

Underground water.

And a grantor may intercept water which is percolating through his retained lands towards lands granted by him: *M'Nab* v. *Robertson*, [1897] A. C. 129.

Support.

In a grant of land is implied a grant of the right to subjacent and adjacent support sufficient to support the land in its then state, or in the state for the purpose of putting it into which the grant is made: *Caledonian Ry. Co.* v. *Sprot* (1856), 2 Macq. 449; cf. *Elliott* v. *North Eastern Ry. Co.* (1863), 10 H. L. C. 333; *Aspden* v. *Seddon* (1875), L. R. 10 Ch. 394; *Rigby* v. *Bennett* (1882), 21 Ch. D. 559.

But in the case of purchases made compulsorily under statutory powers, the right to support depends on the statutory provisions, if any, in that behalf.

"If the conveyance is made for the express purpose of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which, to the knowledge of the grantor, the conveyance is made:" per Page Wood, V.-C., *North Eastern Ry. Co.* v. *Elliott* (1860), 1 J. & H. 145 at p. 153.

Accidental condition.

But this principle does not require the maintenance of an accidental condition of things existing at the date of the conveyance, *e.g.*, the grantee of land is not entitled to prevent the grantor from draining a drowned mine which adjoins or subjoins the land granted, and thereby depriving the grantee of the support of the water: *Ibid.*

Support from underground water.

Nor does it prevent a person claiming under the grantor from draining the retained land, even though by so doing he deprives the grantee of the support of the water which was contained in the granted land: *Popplewell* v. *Hodkinson* (1869), L. R. 4 Ex. 248; but this exception only applies to water and not to silt: *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; nor to pitch: *Trinidad Asphalt Co.* v. *Amsard*, [1899] A. C. 594; in neither of which cases, however, did the abstractor claim under the grantor.

Right of way not continuous and apparent easement,

A right of way is not a "continuous and apparent" easement within the above proposition.

It used to be the law that by the grant of a part of a tenement no discontinuous easement over the part retained by the grantor, other than a way of necessity, passed to the grantee if the conveyance contained no general words, or only the word "appurtenances" or its equivalent, but discontinuous easements did pass if the conveyance contained the words "therewith used or enjoyed" or their equivalent, and this is still the law except with regard to a right of way over a formed road, as to which see *infra*, p. 260.

unless over formed road.

"It has been decided over and over again that where an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises to which it was formerly appurtenant, he must use language to show that he intended to create the easement *de novo*. If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass, except in a case of a way of necessity, where such a way would pass without any words of grant of ways. . . . If in the case

of an easement extinguished by unity of ownership, a man grants the land to which before the extinguishment the right of common was attached, and uses only the words 'appertaining' and 'belonging,' the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement; and if you will only insert the words 'or therewith used and enjoyed,' the right would pass. It has been said at the Bar that there is a distinction between 'belonging' and 'appertaining'; it is the first time that I have heard of such a distinction:" per Bayley, B., *Barlow* v. *Rhodes* (1833), 1 Cr. & M. 439 at p. 448. See, to the same effect, *Plant* v. *James* (1833), 5 B. & Ad. 791; 2 Nev. & M. 517; S. C. *sub nom. James* v. *Plant* in error (1836), 6 Nev. & M. 282; 4 A. & E. 749; *Worthington* v. *Gimson* (1860), 2 El. & El. 618; 29 L. J. Q. B. 116; and the remarks of Kelly, C.B., in *Langley* v. *Hammond* (1868), L. R. 3 Ex. 161; but these cases must be considered as now overruled, so far as they are inconsistent with the proposition stated below as to rights of way over formed roads. For it is now law that—

"Belonging."

Right of way over formed road passes as incident to land.

> "If one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre and that has been used for the purpose of Blackacre in such a way that, if the two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser retaining Whiteacre, then the grant of Blackacre, either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre:" per Fry, L.J., *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D. 434 at p. 457; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490.

Road must be formed.

The way must be over a defined and formed road: per Bramwell, B., *Langley* v. *Hammond* (1868), L. R. 3 Ex. 161 at p. 171; per Mellish, L.J., *Watts* v. *Kelson* (1871), L. R. 6 Ch. 166 at pp. 172, 174; per Lush, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360 at p. 370; and per Fry, J., *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616 at p. 622. *Thomson* v. *Waterlow* (1868), L. R. 6 Eq. 36, is

distinguishable on the ground that, as appears from other reports, there was not a formed road: see 37 L. J. Ch. 495 at p. 498; 18 L. T. 545 at p. 547; and 16 W. R. 686 at p. 687.

And must be convenient for severed tenement.

If the convenience of use ceases upon the severance, the right of way will not pass: per Romilly, M.R., *Thomson* v. *Waterlow* (1868), L. R. 6 Eq. 36 at p. 41; and per Blackburn, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360 at pp. 366, 367; distinguishing *Langley* v. *Hammond* (1868), L. R. 3 Ex. 161 on this ground.

Chitty, J., seems to have doubted whether the mere grant of Blackacre, without any general words at all, would pass the right of way: see *Re Contract between Peck and School Board for London*, [1893] 2 Ch. 315 at p. 322. On the other hand, it was held by the Court of Appeal in *Ford* v. *Metropolitan Ry. Co.* (1886), 17 Q. B. D. 12 (a case which was not cited to Chitty, J.) that where a railway company had interfered with a right of access to certain rooms, which was not a way of necessity, an arbitrator was entitled to give compensation for such interference, as the right of access was in the nature of a continuous and apparent easement which passed under the demise of the rooms, though such demise contained no express grant of any mode of access.

Immaterial whether easement existed before unity of possession.

It makes no difference whether the way or other right existed as a legal easement in respect of the alleged dominant tenement before the two tenements became united in possession or was first used during the unity of possession, and the decision of Romilly, M.R., in *Thomson* v. *Waterlow* (1868), L. R. 6 Eq. 36, and the *dicta* of Kelly, C.B., in *Langley* v. *Hammond* (1868), L. R. 3 Ex. 161, to the contrary are overruled: *Watts* v. *Kelson* (1871), L. R. 6 Ch. 166; *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360; *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616; they are also inconsistent with the earlier Scots case of *Ewart* v. *Cochrane* (1861), 7 Jur. N. S. 925; 4 Macq. 117, which was not cited in *Thomson* v. *Waterlow* or *Langley* v. *Hammond*. "But it makes a great difference as matter of evidence on the question whether the way" or other right "was used and enjoyed as appurtenant:" per Blackburn, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 363 at p. 367; for a way from close A. over close B. used before unity of possession would probably be a defined way, as no man would be likely to allow his neighbour to pass over his land in any direction that he liked, and would probably be for the convenience of close A. after severance, as it must have been for its convenience before unity of possession, and therefore proof of user before unity of possession is strong

evidence that the way is sufficiently defined, and that it will be convenient after severance.

Enjoyment by verbal permission.

The general words incorporated in conveyances by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6, pass to a purchaser rights of way actually enjoyed by him at the date of the conveyance by verbal permission only of the vendor: *International Tea Stores Co.* v. *Hobbes*, [1903] 2 Ch. 165, which was the case of a leaseholder purchasing the freehold reversion, the vendor being owner of adjoining land also, and having allowed the lessee by verbal permission to go over such adjoining land.

Way of necessity.

> "A right of way of necessity passes as incident to the grant" (*i.e.*, without any express words), "for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself:" 1 Wms. Saund. 323, n. (ed. 1871 p. 570); Tud. L. C. Real P., 4th ed. 754; see *Pinnington* v. *Galland* (1853), 9 Exch. 1.

The following are some of the early cases relating to ways of necessity: *Jorden* v. *Atwood* (1605), Owen, 121; *Clarke* v. *Rugge* (1607), 2 Roll. Abr. 60, pl. 17, 18; S. C. *sub nom. Clark* v. *Cogge*, Cro. Jac. 170; *Packer* v. *Welsted* (1657), 2 Sidf. 39, 111; *Dutton* v. *Taylor* (1699), 2 Lut. 1487; Nel. Lut. 477; *Staple* v. *Heydon* (1703), 6 Mod. 1.

Grantor's land need not surround the close.

It has been decided that the grantor's land must entirely surround the land granted, otherwise no way of necessity arises: *Titchmarsh* v. *Royston Water Co.*, (1900) 48 W. R. 201; but this decision cannot be supported, and there are authorities to the contrary, viz.: 2 Roll. Abr. 60, pl. 18; *Pinnington* v. *Galland* (1853), 9 Exch. 1, where the right of way arose upon the contemporaneous sale to different purchasers of the alleged dominant and servient tenements, but the dominant tenement was not surrounded on all sides by land of the grantor; and the *dictum* of Blackburn, J., in *Pearson* v. *Spencer* (1861), 1 B. & S. 571 at pp. 582 and 584, where he said: "It was not disputed . . . that inasmuch as the portion of the farm bequeathed to Abraham was surrounded by the property of third persons, so that there was no access to it at all except by crossing the other property of the testator, which he bequeathed to John Pearson, some way of necessity must be given over John Pearson's farm:" p. 582. "When, as in the present case, property devised or granted is land-locked, and there is no other way of

getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo:*" p. 584. It may be observed that neither *Pinnington* v. *Galland* nor *Pearson* v. *Spencer* was referred to in *Titchmarsh* v. *Royston Water Co.*

Way of necessity only arises on grant or devise.

A way of necessity only arises on severance by grant (or by devise: *Pearson* v. *Spencer* (1861), 1 B. & S. 571; (1863), 3 B. & S. 761); such a way does not arise if the severance be by escheat: *Proctor* v. *Hodgson* (1855), 10 Exch. 824; or by the Statute of Limitations: *Wilkes* v. *Greenway* (1890), 34 Sol. Journ. 673; The Times, July 30th, 1890, 3 d.

If grantor trustee.

And where the grantor was trustee of the land sold, and there was no access thereto but over land of which he was beneficial owner, it was held that the grantee had a right of way over the grantor's own land: *Howton* v. *Frearson* (1798), 8 T. R. 50.

Extent of way of necessity.

A way of necessity which passes to the grantee is limited to user thereof for the purposes for which the land granted was used at the time of the grant (see per Jessel, M.R., *Corporation of London* v. *Riggs* (1880), 13 Ch. D. 798 at pp. 807, 808); but if the grant was for a special purpose it can at any rate be used also for the purposes for which the land was granted: *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679.

Way of necessity is for ever.

It has been suggested that a right of way which arises by necessity ceases when the necessity for using it ceases, and *Holmes* v. *Goring* (1824), 2 Bing. 76; 9 Moo. 166, has been cited as an authority for this proposition; but if the case is carefully examined it will be seen that it is not really an authority for any proposition other than that there must be, at the time of the grant, actual necessity for the way, and on that case Parke, B., has remarked: "The extent of the authority of *Holmes* v. *Goring* is that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong—but that is not the question now." And Alderson, B. remarks: "Probably if this case be taken to a Court of Error, *Holmes* v. *Goring* will be reviewed:" *Proctor* v. *Hodgson* (1855), 10 Exch. 824 at pp. 827, 828.

Grantor selects the way.

When on a grant of land there arises by implication either a grant or a reservation of a way of necessity, the grantor is entitled to determine where the way is to be; see, as to grants, *Clarke* v. *Rugge* (1607), 2 Roll. Abr. 60 pl. 17; as to reservations, *Packer* v.

Welsted (1657), 2 Sidf. 39, 111. "In each case it appears to have been thought that the person by whose act the way was created was subsequently to select the way, subject only to this, that it should be a convenient way:" per Blackburn, J., *Pearson* v. *Spencer* (1861), 1 B. & S. 571, at p. 585, followed, in the case of a way incident to a grant, in *Bolton* v. *Bolton* (1879), 11 Ch. D. 968.

Way of necessity is always the same.

A way of necessity once created must remain the same way so long as it exists.

"It seems to us settled by modern authority that the ground on which the way of necessity is created is that a convenient way is impliedly granted as a necessary incident. It is observed by Parke, B., in *Proctor* v. *Hodgson* (1855), 10 Exch. 824 at p. 828, that the extent of the authority of *Holmes* v. *Goring* (1824), 2 Bing. 76; 9 J.B. Moo. 166, is that though it is a grant it may be construed to be a grant of such a right of way as from time to time may be necessary. He adds, 'I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at the time that the Court was wrong.' We certainly do not feel inclined to extend the authority of *Holmes* v. *Goring*, so far as to hold that the person into whose possession the servient tenement comes may from time to time vary the direction of the way of necessity at his pleasure so long as he substitutes a convenient way. We think we must hold that the way of necessity once created must remain the same way as long as it continues at all:" per Blackburn, J., *Pearson* v. *Spencer* (1861), 1 B. & S. 571 at p. 584.

No implied reservation in favour of grantor of part of tenement, except way of necessity, or over formed road, and reciprocal easements of support and drainage.

In the absence of express stipulation, the grantor of part of a tenement retains no rights of any nature over the part granted: *Suffield* v. *Brown* (1864), 4 De G. J. & S. 185 at p. 194; *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31; *Union Lighterage Co.* v. *London Graving Dock*, [1901] 2 Ch. 300; [1902] 2 Ch. 557; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17; except (i.) a way of necessity, (ii.) a right of way over a formed road, where the retained part of the tenement is leased at the time of the grant, and probably even if it is not, and (iii.) reciprocal easements of support and drainage.

Rule applies to mortgages.

The rule applies where the part granted is only granted by way of mortgage: *Taws* v. *Knowles*, [1891] 2 Q. B. 564.

In *Pyer* v. *Carter* (1857), 1 H. & N. 916, it was held that, on the sale of part of a tenement, there was implied in favour of the vendor a reservation of an apparent and continuous easement, annexed in enjoyment to the part reserved, over the part sold; in fact, that there is no distinction between an implied reservation and an implied grant. Although this decision was approved by Mellish and James, L.JJ., in *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166, its principle was over-ruled in *White* v. *Bass* (1862), 7 H. & N. 722, and the decision itself was strongly disapproved by Lord Westbury, C., in *Suffield* v. *Brown* (1864), 4 De G. J. & S. 185; by Lord Chelmsford, C., in *Crossley & Sons* v. *Lightowler* (1867), L. R. 2 Ch. 478; and by the Court of Appeal in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, on the ground that no man should be allowed to derogate from his own grant, and it must, it is submitted, be considered as having been over-ruled, unless it can be upheld on the grounds stated by Thesiger, L.J., in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31 at p. 59.

Exception of way of necessity.

Where a man having a close surrounded by his own land, grants the close to another in fee, for life, or years, the grantee shall have a right of way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant. "So it is where he grants the lands and reserves the close to himself:" *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323 (ed. 1871, p. 568), note 6, citing *Clarke* v. *Rugge* 2 Roll. Abr. 60, pl. 17, 18, S. C. *sub nom. Clarke* v. *Cogge* (1607), Cro. Jac. 170; *Jorden* v. *Atwood* (1605), Owen, 121; *Staple* v. *Heydon* (1703), 6 Mod. 1; *Howton* v. *Frearson* (1798), 8 T. R. 50. This note is cited with approval by Martin, B., in the judgment of the Court in *Pinnington* v. *Garland* (1853), 9 Exch. 1, where he adds (at p. 12): "It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor* ((1699), 2 Lutw. 1487), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." See also *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31 at p. 49.

Building schemes.

Although nothing but a way of necessity is impliedly reserved to the vendor, yet special words in the grant or special circumstances known to the grantee at the time of the grant may show that rights, other than rights strictly of necessity, are reserved to the grantor. Thus, it has been held that on the sale of land to a purchaser, who had notice that adjoining land belonging to the vendor was to be laid out for building in a manner which would make a way over the purchased

Way.

land necessary to the vendor, such right of way was reserved to the vendor by implication: *Davies* v. *Sear* (1869), L. R. 7 Eq. 427; and in a case in which the lessee of several plots of land, in the lease of each of which was a covenant to build in accordance with certain plans, built thereon, in accordance with those plans, a large warehouse, which was capable of being subdivided into several blocks each capable of being used as a separate building, it was held that the mortgagee of one of the blocks who had foreclosed, but whose mortgage contained a recital of the building scheme and a covenant to complete in accordance therewith, could not interfere with the access of light to the other blocks: *Russell* v. *Watts* (1885), 10 Ap. Ca. 590, in which case Lord Selborne, L.C., said (at p. 602): "If on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand (whether wholly or partly I think is immaterial), within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, can the purchaser afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows? I should have been prepared to decide that he could not, even if there had been no such authorities as *Palmer* v. *Fletcher* (1663), 1 Lev. 122; *Swansborough* v. *Coventry* (1832), 9 Bing. 305; *Compton* v. *Richards* (1814), 1 Price, 27; *Allen* v. *Taylor* (1880), 16 Ch. D. 355."

Lights.

Extent of way of necessity reserved.

In *The Corporation of London* v. *Riggs* (1880), 13 Ch. D. 798, the question arose what was the extent of a way of necessity impliedly reserved to the grantor. It was held by Jessel, M.R., citing *Gayford* v. *Moffatt* (1868), L. R. 4 Ch. 133, that the right of way must be limited to that which is necessary at the time of the grant; that is, the owner must be supposed to take a re-grant to himself of such a right of way as would enable him to use the reserved close as it was at the time of the grant. "That appears to me to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes: that is—as in the case I have before me—a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way of necessity;

I think it must be limited by the necessity at the time of the grant; and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided. I may be met by the objection that a way of necessity must mean something more than what I have stated, because, where the grant is of the enclosed piece, the grantee is entitled to use the land for all purposes, and should therefore be entitled to a right of way commensurate with his right of enjoyment. But there again the grantee has not taken from the grantor any express grant of a right of way; and all he can be entitled to ask is a right to enable him to enjoy the property granted to him as it was granted to him. It does not appear to me that the grant of the property gives any greater right. But even if it did, the principle applicable to the grantee is not quite the same as the principle applicable to the grantor; and it might be that the grantee obtains a larger way of necessity—though I do not think he does—than the grantor does under the implied re-grant : " *Ibid.* at p. 807.

Exception of way over formed road.

A way of necessity means a way without which there is no access to the land in question, and so where an owner of two tenements granted one, including a passage, which had been used as a means of access to the other, it was held that he had no right of access over such passage to the retained tenement, it not being a way of necessity, though the convenient and usual mode of access : *Dodd* v. *Burchell* (1862), 1 H. & C. 113; 8 Jur. 1180; but in *Thomas* v. *Owen* (1887), 20 Q. B. D. 225, it was held, in a similar state of circumstances, except that the retained tenement was at the time of the grant in lease, that a subsequent lessee of the retained tenement had a right of way over the passage, which was a formed road, under a lease of the retained tenement and its appurtenances. "It is urged that alike in implied reservations and in implied grants, a rule exists to this effect, that whilst such an implication" (*i.e.*, of the grant or reservation of an easement) "may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden* v. *Bastard* (1865), L. R. 1 Q. B. 156, is cited, and many other authorities might have been invoked. But on this principle as established by such decisions there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (per Bramwell, B., in

Langley v. *Hammond* (1868), L. R. 3 Ex. 161; *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166), and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case:" per Fry, L.J., *Thomas* v. *Owen* (1887), 20 Q. B. D. 225 at p. 231.

Exception of reciprocal easements of support;

"We are all of opinion that, where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of the houses, as against himself grants such right, and on his own part also reserves the right, and consequently the same mutual dependence of one house upon its neighbours still remains:" *Richards* v. *Rose* (1853), 9 Exch. 218 at p. 221; *Russell* v. *Watts* (1883), 25 Ch. D. 559 at p. 573.

and drainage.

"I have already pointed to the special circumstances in *Pyer* v. *Carter* ((1857), 1 H. & N. 916), and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land, and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer* v. *Carter* is right or wrong comes for discussion, to consider that point:" per Thesiger, L.J., *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31 at p. 59.

Grantor cannot derogate from grant.

In the absence of express stipulation the grantor of part of a tenement cannot use the part retained so as to derogate in any way from the grant.

Palmer v. *Fletcher* (1663), 1 Lev. 122; S. C. *sub nom. Palmer* v. *Fleshees*, 1 Sidf. 167, 227; *sub nom. Palmer* v. *Flessier*, 1 Keb. 553, 625, 794; reported to the contrary *sub nom. Palmer* v. *Fleshees*, Sir Thomas Raym. 87; *North Eastern Ry. Co.* v. *Elliot* (1860), J. & H. 145; S. C. *sub nom. Elliot* v. *North Eastern Ry. Co.* (1863), 10 H. L. C. 333; *Allen* v. *Taylor* (1880), 16 Ch. D. 355.

"If a landowner conveys one of two closes to another he cannot afterwards do anything to derogate from his grant; and if the conveyance is made for the express purpose of having buildings erected

upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which to the knowledge of the grantor the conveyance is made:" per Wood, V.-C., *North Eastern Ry. Co.* v. *Elliot* (1860), 1 J. & H. 145 at p. 153; cf. *Pollard* v. *Gare*, [1901] 1 Ch. 834.

Rule applies to all grantor's land.

The rule applies to the grantor as owner of all the rest of the tenement whether actually adjoining the part granted or separated from it by a street or passage: *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295.

Railway company.

The rule applies where the grantor is a railway company, except so far as the grantor may require to use the part retained for the construction of their railway: *Myers* v. *Catterson* (1889), 43 Ch. D. 470; and the rule applies where the grantor is a mortgagee selling under his power of sale: *Born* v. *Turner*, [1900] 2 Ch. 211.

Building schemes.

The rule, however, does not entitle the grantee to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee: *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295; followed in *Godwin* v. *Schweppes, Ltd.*, [1902] 1 Ch. 926, where there was a building agreement under which the grantee of the alleged dominant tenement was to build on the alleged servient tenement, and where the grantee, with the concurrence of the grantor but in deviation from the building agreement, had built part of the wall of the dominant tenement as a party-wall and had laid in the servient tenement foundations for buildings similar to those built on the dominant tenement, and where there was in the conveyance of the dominant tenement a plan plainly showing only a small open area on the servient tenement.

But the subsequent use of the land retained must be consistent with and in pursuance of the user contemplated at the time of the grant: *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522.

Extraordinary light.

This rule does not give the grantee the right to light for extraordinary purposes, but only to light sufficient for all ordinary purposes of business in the locality: *Corbett* v. *Jonas*, [1892] 3 Ch. 137.

Air.

Nor does it give him the right to access of air except where such right is enjoyed through a definite aperture in the nature of a window on the property granted, or through a definite channel on the property retained, but if the grant is for a particular purpose, as for carrying on the business of a timber merchant, the grantor cannot build on the part retained so as to interrupt access of air

to sheds built by the grantee for drying timber so as to interfere with the conduct of the business in the ordinary course: *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437.

Grant for particular trade.

Where premises are demised for the purpose of carrying on a particular trade, the lessor is not bound to abstain from doing a lawful act on his retained premises which is detrimental to one delicate branch of the lessee's trade, though not to the lessee's trade generally, at least if the lessor, when granting the lease, did not know, and it was not common knowledge, that such act would be injurious to that branch of the lessee's trade: *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88.

Building land.

The mere designation of the retained land in the deed and on the plan annexed thereto as "building land" does not show an intention so to restrict the right of light implied in the conveyance of a house as to enable the vendor to interfere with the access of light, nor does it show an intention that the general words contained in sect. 6 of the Conveyancing and Law of Property Act, 1881, should not be incorporated into the conveyance: *Broomfield* v. *Williams*, [1897] 1 Ch. 602; followed in *Pollard* v. *Gare*, [1901] 1 Ch. 834, where there was an agreement under which a house was to be built by the intended lessee and a lease granted thereof when built.

Rule only applies to what grantor might have granted.

The grantee, moreover, only gets such rights as the grantor could himself grant; so that if at the time of the grant the grantor has contracted to sell the part retained the grantee is not entitled, as against the purchaser of such retained part, to the benefit of the rule: *Beddington* v. *Atlee* (1887), 35 Ch. D. 317.

So where Broadhaven House was supplied by a line of pipes with water from a well on Swanswell, which adjoined Broadhaven House, and the owner of both made an equitable mortgage of Swanswell by deposit of deeds, with an agreement to execute a legal mortgage, and afterwards conveyed Broadhaven House with the appurtenances to the plaintiff, and then executed a legal mortgage of Swanswell to the mortgagee, who conveyed to the defendant, it was held that the purchaser of Broadhaven had no implied grant of the supply of water from Swanswell: *Davies* v. *Thomas* (1899), W. N. 244.

Rights determined at date of contract.

The rights to be enjoyed with a house to be built are to be determined, not at the time of the conveyance, but of the contract for the purchase, of the site: per Rigby, L.J., *Broomfield* v. *Williams*, [1897] 1 Ch. 602 at p. 616; *Pollard* v. *Gare*, [1901] 1 Ch. 834; and *Godwin* v. *Schweppes, Ltd.*, [1902] 1 Ch. 926.

Contemporaneous sales.

Where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous and apparent *quasi*-easement in respect of either property is the same as if it had been conveyed first: *Compton* v. *Richards* (1814), 1 Pri. 27; *Swansborough* v. *Coventry* (1832), 9 Bing. 305; *Allen* v. *Taylor* (1880), 16 Ch. D. 355; *Rigby* v. *Bennett* (1882), 21 Ch. D. 559 at p. 567; *Russell* v. *Watts* (1883), 25 Ch. D. 559 at pp. 573, 584, and (1885), 10 Ap. Ca. 590 at p. 612.

It will be observed that this proposition is, strictly speaking, not a rule of interpretation for the construction of the deeds, but an application of the rule of equity, that the purchaser of property takes it subject to all equitable interests of which he has notice.

Sales must be contemporaneous.

This proposition does not extend to the case where two properties are put up for sale at the same auction, and one only is sold, and the other is shortly afterwards sold: *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31.

Rule applies to devises.

This principle applies also where two tenements are devised by the same will, and it is immaterial that one passes by specific devise and the other by residuary devise: *Barnes* v. *Loach* (1879), 4 Q. B. D. 494; *Phillips* v. *Low*, [1892] 1 Ch. 47.

"All the estate" clause.

In conveyances executed prior to 1882 it was usual to add to the parcels a conveyance of all the estate, right, and title of the conveying party in the property conveyed; and by sect. 63 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), every conveyance executed after 1881 is by virtue of that Act effectual to pass, if and so far as a contrary intention is not expressed in the conveyance, "all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed or expressed, or intended so to be, or which they respectively have power to convey in, to, or on the same." Since 1881 it has been usual to omit the express conveyance of the conveying parties' estate, relying on the terms of the Act.

Conveyance of all a man's estate and interest for value.

A conveyance (whether express or implied by the terms of the Conveyancing Act) of all the estate, right, title, or interest of the grantor in property to a purchaser for value, passes every interest of the grantor, although

not vested in him in the character in which he is made a party to the conveyance.

"Estate." "'State' or 'estate' signifieth such inheritance, freehold, term for years, tenancy by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass. . . . Tenant for life, the remainder in tail, the remainder to the right heirs of tenant for life, tenant for life grants *totum statum suum* to a man and his heirs, both estates do pass. 'Right,' *jus sive rectum* (which Littleton often useth) signifieth properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c., where it shall be said *quod jus discendit et non terra.* But 'right' doth also include the estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for years, and release all his right in the land to the lessee and his heirs, the whole estate in fee simple passeth. And so commonly in fines, the right of the land includeth and passeth the state of the land; as *A. cognovit tenementa praedicta esse jus ipsius, B.*, &c. And the statute (West. 2, c. 3) saith *jus suum defendere*, which is *statum suum.* And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus possidendi.* 'Title,' properly (as some say) is when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action, as title of condition, title of mortmain, &c. But legally this word 'title,' includeth a right also as you shall perceive in many places in Littleton; and title is the more general word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *titulus est justa causa possidendi quod nostrum est*, and signifieth the means whereby a man cometh to land, as his title is by fine or by feoffment, &c. And when the plaintiff in assize maketh himself a title, the tenant may say *veniat assisa super titulum;* which is as much as to say, upon the title which the plaintiff hath made by that particular conveyance. *Et dicitur titulus a tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. . . . 'Interest,' *Interesse* is vulgarly taken for a term or chattel real, and more particularly for a future term; in which case it is said in pleading, that he is possessed *de interesse termini.* But *ex vi termini*, in legal understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them;

"Right."

"Title."

"Interest."

and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall pass. And all these words singularly spoken are *nomina collectiva;* for by the grant of *totum statum suum* in lands all his estates therein pass. *Et sic de caeteris:*" Co. Litt. 345 a. See also *Altham's Case* (1610), 8 Rep. 150 b.

"If a man be seised of land in fee simple, or for life, or have an estate in it for years, by statute merchant, staple, *elegit,* or the like; and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant all his estate, and as much as he is able to grant, doth pass:" Shep. Touch. 98.

"This is clear, that when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. It is true that in *Fausset* v. *Carpenter* ((1831), 2 Dow. & Cl. 232; 5 Bli. N. R. 75), the House of Lords took a different view. At the time when that case was decided, it was thought impossible to maintain the decision, and it was a subject of consideration among the profession whether it would not be advisable to bring in a short Act of Parliament to reverse it. That case cannot operate to weaken the rule of law. Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance:" per Lord St. Leonards, C., *Drew* v. *Earl of Norbury* (1846), 3 J. & L. 267 at p. 284; 9 Ir. Eq. Rep. 171 at p. 177.

"*Primâ facie,* when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. General words apt for that purpose are invariably used:" per Lord Cranworth, C., *Johnson* v. *Webster* (1854), 4 De G. M. & G. 474 at p. 488.

The principle above laid down by Lord St. Leonards was approved and adopted by Stirling, L.J., delivering the judgment of the Court of Appeal in *Taylor* v. *London and County Banking Co.,* [1901] 2 Ch. 231 at p. 255.

Possibility.

Conveyance by A. of "all lands whereof he or any one in trust for him had any estate either in law or equity in possession, reversion, or remainder, and to which he had any right, title, *claim,* or demand under his father's will." *Held,* to pass a possibility in

lands devised by the father's will, Lord Hardwicke saying, "He has taken upon him to convey everything, though he has unluckily left out the most proper word, "possibility." It is true he had no immediate claim or demand, but the word "claim" may describe it *in praesenti* or *futuro*, and there is a covenant for further assurance. This, therefore, is well described:" *Wright* v. *Wright* (1750), 1 Ves. Sen. 409 at p. 413.

Remainder.

A tenant for years, in whom was also vested a remainder *pur autre vie* in the land, granted the land *et totum statum suum* to B. for years. *Held*, that his estate in remainder passed: *Bernard* v. *Bonner* (1648), Aleyn 58.

Sub-term.

Where A. was owner in fee simple of lands subject to a lease to B., who sub-demised to C. for the term less twenty-one days, and assigned the lands to A. for a term exactly co-extensive with C.'s term, and A., by lease and release, conveyed the lands and "the reversion and reversions, &c.," to a mortgagee, habendum to the mortgagee, his heirs and assigns, for ever. *Held*, that the chattel interest of A. passed to his mortgagee as well as the fee: *Burton* v. *Barclay* (1831), 7 Bing. 745.

Term *en autre droit.*

A grant of *totum jus, titulum, et interesse suum de et in decimis praedictis*. *Held*, to pass a lease of tithes held by the grantor in right of his wife as executrix of her former husband: *Arnold* v. *Bidgood* (1612), Cro. Jac. 318.

So where a term was vested in a widow as administratrix, and she re-married and her husband released unto the lessor all his right and title to the premises, it was held that the term was effectually surrendered: *Thrustout* d. *Levick* v. *Coppin* (1772), 2 Wm. Bl. 801; 3 Wils. 277.

Merged term.

In *Thellusson* v. *Liddard* [1900] 2 Ch. 635, the words implied in the conveyance by sect. 63 of the Conveyancing Act were held to be sufficient to pass an equitable right to a term which had probably merged at law, but which the parties interested therein had treated as still subsisting.

Rent-charge.

Where a husband was entitled to a rent-charge issuing out of his wife's hereditaments, and they both granted and released one moiety of such hereditaments and "all the estate, right, title, interest, property, claim, and demand" of either of them in the hereditaments, it was held that such conveyance operated by way of release of the rent-charge, leaving the whole rent-charge charged upon the remaining moiety: *Price* v. *John*, [1905] 1 Ch. 744.

Context.

But of course the whole deed must be looked at and the frame

of the deed may show that the estate clause is to be limited in some way.

Conditional term.

An assignment by a lessee for years of "all the interest, term and terms that he then had" was held not to pass a term which might arise at the end of the then existing term on the performance of a condition: *Skerne's Case* (1560), Moore 27.

And where A. was entitled to the entirety of property for life, with remainder, as it was believed, as to one moiety to B. in fee, A. and B. conveyed by way of mortgage "all that undivided moiety of B.," and "all the estate, &c., of A. and B." It turned out that B.'s reversionary interest was in one-fifth only. *Held*, that A.'s life interest in one-fifth only passed: *Grieveson* v. *Kirsopp* (1842), 5 Beav. 283.

Covenant against assignment.

In *Francis* v. *Minton* (1867), L. R. 2 C. P. 543, A., being owner in fee of one moiety of a messuage, and lessee of the other moiety subject to a covenant not to assign without licence, granted to B. in fee by way of mortgage, all the messuage "and all the estate, &c.," of A. in the messuage. *Held*, that only his fee simple moiety passed. But the decision was based on "the facts and the frame of the deed" (per Bovill, C.J., at p. 550), and especially on the existence of the covenant against assignment.

Restricted by recitals.

Where a tenant in tail reciting that she was entitled on a particular contingency to an estate tail in certain hereditaments granted the lands so devised to her and all her estate and interest therein freed from all estates tail, it was held that an estate tail in the same hereditaments to which she was entitled on another contingency was not barred: *Grattan* v. *Langdale* (1883), 11 L. R. Ir. 473.

The words "and all other the estate, if any," of a compounding debtor, following an assignment of certain properties specified in a schedule, "and all the estate, right, title, interest, claim and demand" of the debtor in such properties, were held insufficient to pass a life interest in certain property not mentioned in the schedule, but this construction was helped by the recitals; *Ex parte Dawes, Re Moon* (1886), 17 Q. B. D. 275.

A. and B., being together entitled to the fee simple of land, subject to certain mortgages on the fee and a term mortgage for 2,000*l.* vested in B., conveyed, according to their respective estates and interests, the fee simple on a marriage and "all the estate," &c., of them. The deed contained no reference to the term mortgage for 2,000*l.* *Held*, that the term did not pass: *Williams* v. *Pinckney* (1897), 67 L. J. Ch. 34, affirming 66 L. J. Ch. 551.

Trustee having also beneficial interest.

Where a person has some beneficial interest, in property vested in him as trustee, it may appear from the whole deed that what he intends to convey is only the interest vested in him as trustee, or only his beneficial interest, as the case may be.

In Lewin on Trusts (11th ed.), c. 12, s. 2, p. 246, it is said: "In dealings with the trust estate the Court has regard to the trust, and will not construe general words to pass the trust estate, where the assurance, if so construed, would amount to a breach of trust," and *Fausset* v. *Carpenter* (1831), 2 Dow. & Cl. 232; 5 Bli. N. R. 57, stated *infra*, p. 277, is cited. Mr. Lewin's proposition appears to be laid down too widely, and ought to be restricted to cases where the conveyance of the estate would *on the face of the assurance*, amount to a breach of trust. It is submitted that the true rule as to trust estates is as above stated.

Examples.

A release by a legatee of his legacy and all actions, &c. *Held*, not to extend to an action which he had in his capacity of executor of another: *Knight* v. *Cole* (1690), Carth. 118; Holt, 620; 3 Mod. 277; 3 Lev. 273; 1 Show. K. B. 150; *Hutchinson* v. *Savage* (1710), 2 Ld. Raym. 1306.

Defendant, owning a moiety of certain property beneficially and being a trustee with others of another third, conveyed his undivided moiety and all his estate, &c., in the premises. *Held*, that his beneficial interest alone passed: *Doe* d. *Raikes* v. *Anderson* (1816), 1 Stark. 155.

A widow, entitled under her marriage settlement and otherwise to charges on her husband's estate, was one of the trustees of his will, whereby the estates were devised in trust to raise 2,000*l*. for her benefit, and subject thereto, in trust to convey the estates as H. should direct. H. borrowed money on a mortgage of one of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that H. had directed the widow and her co-trustee, "as such devisees in trust as aforesaid, to make such conveyance as is hereinafter contained," the widow and her co-trustee, "as such devisees as aforesaid," granted the parcels with an estate clause. *Held*, that the deed did not pass the beneficial interest of the widow, but that her charges were postponed to the mortgage, she having concurred therein without reserving her priority: *Stronge* v. *Hawkes* (1853), 4 De G. M. & G. 186.

"Several cases were cited to show, what it hardly needed

authority to show, that where a person assigns and conveys 'all his estate, right, title, and interest,' and all his estate, right, title, and interest are not recited in the deed, still if he has other beneficial interests in the property, they pass. . . . It is well-known law that estates vested in a person in *autre droit* are so different from estates vested in him in his own right . . . that an assignment by a person of all his goods and chattels will not pass those he holds as executor, unless he have none of his own; in which case, from the necessity of the thing, they are held to pass; the ground of that doctrine being that the two things are so clearly distinct in the party, that the intention, when he speaks of his own *simpliciter*, is not to pass anything which he holds in *autre droit*. . . . But here all the conveying parties are described as executors, and are all, as such, made parties of the one part, and, as a body, convey the whole estate vested in them in the capacity in which they are so made parties. . . . If I had to determine it, I should not think myself justified in holding that a conveyance by persons described as executors, and assigning the estate they held *quâ* executors for the 600 years' term, would pass by force of the words 'and all the estate, right, title, and interest,' that which one of them held for his own purposes and in his own right:" per Wood, V.-C., *Rooper* v. *Harrison* (1855), 2 K. & J. 86 at p. 112.

K. was solely seised as trustee under a will of real estate devised to him in trust for the benefit of the testator's wife and children, of whom K. was one; by deed in consideration of natural love and affection he conveyed all and singular the real estate now vested in K. and all the estate and interest of K. therein to trustees for his own children; it was held that the conveyance did not pass the legal estate vested in K. as trustee: *Sidebotham* v. *Knott* (1872), 26 L. T. 700; 20 W. R. 415.

A, being mortgagee in fee of certain lands, was appointed with B. executor of the mortgagor's will. A. and B. as such executors raised money on the mortgagor's equity of redemption by a conveyance of the land and "all the estate, &c., whatsoever both at law or in equity" of the conveying parties. *Held*, that the legal estate did not pass: *Re Cooke and Bletcher's Contract* (1895), 13 R. 264.

Fausset v. *Carpenter.*

In *Fausset* v. *Carpenter* (1831), 2 Dow & Cl. 232; 5 Bli. N. R. 75, stated fully by Lord St. Leonards, Law of Property, 76, the property had become, as to the beneficial interest, divided into thirds; the owner of one share was the trustee in whom the legal estate in another share was vested in trust for a married woman

and her husband successively for life, with remainder in trust for their children. A conveyance for value was made to a purchaser without any notice of the trusts on the conveyance or otherwise, the trustee conveying with an estate clause. It was held by the House of Lords that the legal estate vested in him as trustee did not pass, on the ground that he had two estates, one of which he might innocently and properly convey, and the other of which he could not convey without fraud and a breach of trust, and that it could not be presumed that he would intend the latter. The case has been so strongly disapproved by Lord St. Leonards (Law of Property, 76; V. & P. (14th ed.), p. 743; *Drew* v. *Earl of Norbury* (1846), 3 J. & L. 267 at p. 284; 9 Ir. Eq. Rep. 171), and by Lord Hatherley (*Carter* v. *Carter* (1857), 3 K. & J. 617 at p. 635), that it cannot be considered as bearing very high authority. It is submitted that the decision in *Fausset* v. *Carpenter* is erroneous, as the fact of the conveyance by the trustee being a breach of trust did not appear *on the face of the conveyance;* it was necessary to look out of the deed in order to ascertain that fact, and hence the case is not within the exception. "It must be taken to have been decided on its own peculiar circumstances," per Stirling, L.J., delivering the judgment of the Court of Appeal in *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231 at p. 255.

Land tax.

The estate clause is not effectual to grant, redeemed land tax that has not been merged: *Blundell* v. *Stanley* (1849), 13 Jur. 998; 18 L. J. Ch. 300; *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91; tithes which have not been merged: *Chapman* v. *Gatcombe* (1836), 2 Bing. N. C. 516; 2 Scott, 738; or a right of entry on a lessee for condition broken: *Hunt* v. *Bishop* (1853), 8 Exch. 675; *Hunt* v. *Remnant* (1854), 9 Exch. 635.

Tithes.

Right of entry.

Release.

Where a release extends to all a man's estate and interest, it will be controlled by the recitals: *supra*, p. 192.

CHAPTER XV.

HABENDUM.

Office of Premises and Habendum explained: Property in Premises passes for Estate in Habendum: Variations from typical Deed: Grantee named in Habendum only: Express Estate limited in Premises: Parcels named in Habendum only: No Habendum: Parcels named in Premises and Habendum: Grant to A., Habendum to A. and others: Grantee named in Premises must take some Estate: Express Estate limited both in Premises and in Habendum.

Premises and habendum distinguished.

As before mentioned, all the parts of a deed (which it must be remembered had formerly few, or no, recitals) before the habendum are called the premises, and in a properly drawn deed no words of limitation should appear in the premises (though Preston (Shep. Touch. p. 74) doubts if it be an error to limit an estate in the premises), and no parcels should appear in the habendum, the office of which is simply to limit the estate. The typical deed should run—A. grants to B. (without any words of limitation) certain lands, habendum to B. and his heirs, or as the case may be.

Habendum does not declare uses.

The declaration of uses, if there be one in the deed, is not a part of the habendum, though the word habendum is sometimes incorrectly used as comprising the declaration of uses.

"The office of the premises of the deed is twofold: first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment. . . . The habendum hath also two parts, viz., first, to name again the feoffee, and secondly, to limit the certainty of the estate:" Co. Litt. 6 a.

"The premises of a deed are all the foreparts of the deed before the habendum. . . . And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. . . . And herein is sometimes (though improperly) set down the estate. . . . The habendum of a deed . . . doth properly succeed the premises. And the office

hereof is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. . . . And herein also is sometimes, though needlessly, set down again the thing granted:" Shep. Touch. 74.

It follows that in the typical deed—

Deeds pass property mentioned in premises for estate mentioned in habendum.

> Everything mentioned in the premises passes by the deed, and the estate taken by the grantee is that conferred on him by the limitations contained in the habendum; and if that estate is contrary to the rules of law the deed is void.

"If in the premises lands be letten or a rent granted (not making mention of what estate), the general intendment is that an estate for life passeth; but if the habendum limit the same for years or at will, the habendum doth qualify the general intendment of the premises:" Co. Litt. 183 a.

"If the thing granted be left out in all, or in part in the habendum, yet the grant is good [by force of the premises]. And therefore if one grant land to A., habendum (without naming the land), to A. and his heirs, &c., or if one grant Whiteacre and Blackacre to A., habendum, Whiteacre to A. and omit Blackacre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases:" Shep. Touch. 76.

"If one grant land to one, to have and to hold to him and his right heirs, by this he hath a fee simple:" Shep. Touch. 102.

"If one grant land, rent, common, or any such like thing, to one in the premises of the deed, without limitation of estate (which in judgment of law is an implied estate for life), to have and to hold to him for a certain number of years, or at will; this habendum is good, and shall stand with the premises and qualify it [or rather explain it]; and by this [gift] the grantee shall have but a lease for years, or at will, as the habendum is:" Shep. Touch. 113.

Further general remarks on the office of the habendum will be found in *Throckmerton* v. *Tracy* (1555), 1 Plow. 145; S. C. *sub nom. Throgmorton* v. *Tracey*, Dyer, 124 a; Co. Litt. 21 a, 26 b, 183 a and b, 190 b, 299 a, 378 b; Com. Dig. Fait, E. (9) and (10); 1 Dav. Prec. 4th ed. 99; 5th ed. 79 *et seq.*

Grant of the site of a rectory with the tithes appertaining thereto, habendum the rectory with the appurtenances for years. *Held*, that

the tithes passed: *Carie's Case* (1585), 1 Leon. 281; S. C. *sub nom. Carew's Case*, Moore, 222.

"And so it is if a lease be made to two, habendum the one moity to the one and the other moitie to the other, the habendum doth make them tenants in common": Co. Litt. 183 b.

Grantees taking as tenants in common.

Demise to A., B., and C., habendum to A. for life, remainder to B. for life, remainder to C. for life. *Held*, they took in succession: *Anon.* (1557), Dyer, 160 b, pl. 43; *Anon.* (1560), Moore, 26, pl. 87; *Sutton and Dowse's Case* (1583), 1 Leon. 10; Co. Litt. 183 b.

Grantees taking in succession.

Demise to A. and B., habendum to A. and B. for the term of their lives and the life of the longest liver of them successively one after the other, as directed in the indenture and not jointly. *Held*, that they took in succession: *Anon.* (1577), Dyer, 361 a, pl. 8.

Lease, habendum to three, as joint tenants for life, with a proviso "that the second shall not occupy during the life of the first, nor the third during the life of the second." The proviso was held to be a mere collateral covenant, not altering the estate limited by the habendum: *Scovel* v. *Cabel* (1588), Cro. Eliz. 89, 107; S. C. *sub nom. Scovell and Cavel's Case*, 1 Leon. 317.

Demise to A. or to A. and his assigns, habendum to him and his assigns during his life and the lives of B. and C. *Held*, that A. took an estate for the three lives: *Utty Dale's Case* (1589), Cro. Eliz. 182; *Rosse's Case* (1599), 5 Rep. 13 a; S. C. *sub nom. Ross* v. *Aldwick* (1597), Cro. Eliz. 491; *sub nom. Roos* v. *Awdwick* (1595), Moore, 398; *sub nom. Rosse* v. *Ardwick* (1601), Gouldsb. 157.

Feoffment to G., habendum after the death of the feoffor to G. in tail, livery *secundum formam*. *Held*, void: *aliter* of the grant of a term to A., habendum after the death of the grantor, in which case the term passes by the premises: *Hogg* v. *Cross* (1591), Cro. Eliz. 254.

Habendum giving estate *in futuro*.

Grant by tenant for life of a term to J., and afterwards grant by tenant for life to C., habendum from a future day for life. *Held*, that the second grant was void, as an estate of freehold cannot commence *in futuro*. "The habendum in this case is not contrary to the premises; for no certain estate is contained in the premises, but generally the land given and granted, which might be qualified by the habendum to an estate for years, or at will. For the office of the premises of a deed of feoffment is to express the grantor, grantee, and thing to be granted, and the office of the habendum is to limit the estate; so that the general implication of the estate which shall pass by construction of law, by the premises, is always controlled and qualified by the habendum. As a lease to two, habendum to one for life, remainder to the other for life, will alter the general

implication of joint tenancy of the freehold, which without any habendum would be made. And although the habendum be void, and so in effect as no habendum, yet no estate shall pass by implication of law against the express limitation of the party, although his limitation be void:" *Buckler's Case* (1597), 2 Rep. 55 a at p. 55 b; S. C. *sub nom. Buckler* v. *Hardy*, Cro. Eliz. 585, Moore, 423.

Habendum giving estate *pur autre vie* to heirs.

Grant of a rent to A. and his heirs, habendum to A., his heirs, executors and assigns, to the use of A. and his assigns during the life of B. *Held*, that if the habendum had been to A. and his heirs during his own life, it had been void; but otherwise of a stranger's life, and that A. took an estate *pur autre vie*, his heir being special occupant, and there can be no general occupant of a rent: *Wilkins* v. *Daure* (1609), Brownl. & G., 169 (the report is not clear).

"If a man grants a rent (and goes no farther) these general words shall create an estate for life, but if the habendum be for years, it shall qualify the general words:" *Altham's Case* (1610), 8 Rep. 150 b at 154 b.

"If by your premises you have given no certain nor express state than that otherwise the law would give, you may alter and abridge, nay you may utterly frustrate it by the habendum:" *Stukeley* v. *Butler* (1614), Hob. 168 at pp. 170, 171.

"If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law; but if an habendum follow, the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void:" *Goodtitle* d. *Dodwell* v. *Gibbs* (1826), 5 B. & C. 709 at p. 717; 8 D. & R. 502 at p. 509.

Assignment of chattel interest to A., B., C., D., to be divided and enjoyed in manner following, viz.: A.'s one-fourth to consist of Greenacre, B.'s of Blackacre, C.'s of Whiteacre, D.'s of Redacre; habendum the said lands to A., B., C., D., as follows, viz.: to A. his one-fourth for his life, and after his death if he should leave lawful issue him surviving to such of them as he should appoint; but if he should die without issue, the said fourth to be divided and descend to the survivor and survivors of the said B., C., and D., which should be then living. A. survived B. and C., and died in the lifetime of D. without having had issue. *Held*, that the habendum was not inconsistent with the premises; that the gift over if A. should die without issue was not void for remoteness; and that D.

was entitled to A.'s share of the lands: *Kerr* v. *Kerr* (1854), 4 Ir. Ch. R. 493; 7 Ir. Jur. 76.

Demise and grant to A. and B., habendum "to A. and B., their heirs and assigns, from the 1st November preceding for the lives of B., C., and D., or for 999 years, or for ever, which should longest last," at a yearly rent, "payable half-yearly during the said term." *Held*, to be a grant in fee farm: *Twaddle* v. *Murphy* (1881), 8 L. R. Ir. 123.

Variations from typical deed.

The following variations from the typical form sometimes occur: (i.) no person is named in the premises as grantee; (ii.) words of limitation are added to the grantee's name in the premises; (iii.) the parcels are omitted from the premises; (iv.) the habendum is omitted altogether; (v.) the parcels are named over again in the habendum; (vi.) persons different from those named as grantees in the premises are named as grantees in the habendum; or (vii.) words of limitation having been added to the grantee's name in the premises, different words of limitation are added to his name in the habendum; and all these variations must be considered.

Mentioning grantee in habendum only is sufficient.

If no person is named as grantee in the premises the person named as grantee in the habendum takes the parcels for the estate limited by the habendum.

"If A. give lands to have and to hold to B. and his heirs, this is good, albeit the feoffee is not named in the premises:" Co. Litt. 7 a; and see further on this point, Co. Litt. 26 b, note 4, "Where one named after the habendum shall take."

"And if the name of the grantee be not contained in the premises, yet if it be in the habendum, it may be good enough. As if one give or grant land habendum to B. and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee simple:" Shep. Touch. 75.

A lease held good, notwithstanding the lessee was not named in the premises of the lease, but only in the habendum: *Butler* v. *Dodton* (1578), Cary, Rep. in Ch. 122; *Eeles* v. *Lambert* (1647), Aleyn, 38 at p. 41.

In *Spyve* v. *Topham* (1802), 3 East, 115, the Court of King's Bench first rejected some words from the premises which would have made the deed inoperative, and then supported the deed from finding the name of the grantee in the habendum.

If words of limitation contained in

If words of limitation are added to the grantee's name in the premises, the estate so granted cannot be abridged,

premises that estate cannot be abridged.

but may be explained or extended by the limitations in the habendum.

The cases are collected *infra* with the cases in which the estate limited by the premises differs from that limited by the habendum.

Parcels omitted from premises do not pass.

If the thing granted is not named in the premises, it will not pass, though named in the habendum.

This rule is laid down in Shep. Touch. 75, on which Mr. Preston says: "Probably this proposition is too general"; but see 3 Prest. Abst. 40. Shep. Touch. *l.c.* continues, "And therefore if a man grant Blackacre only in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed." This passage is cited with approval in 1 Dav. Prec. 4th ed. p. 101; 5th ed. p. 81.

"The King being seised of a manor in fee to which an advowson was appendant, granted the same manor to two for their lives, and afterwards the King reciting the grant for life, granted that the said manor, after their deaths, should remain to two bishops, *habendum et tenendum omnia praedicta terras et tenementa, una cum advocatione ecclesiae praedictae*, &c., and it is there held by all the Justices that by the lease of the manor the advowson did not pass, because nothing was spoken of it in the grant, but it remained in the King as in gross, and not appendant in right nor in possession; and there it is also clearly held that the advowson should not pass to the bishops, because nothing was spoken of the advowson in the grant, but in the habendum, and that nothing shall pass in the habendum if it be not spoken of in the grant, except it be a thing appendant or appurtenant:" *Rex* v. *Abbess of Sion*, Y. B. 38 Hen. VI. (1460) 33 b; cited *Throckmerton* v. *Tracy* (1555), Plowd. 145 at p. 152. It is not clear why the advowson did not pass by the lease for lives, but probably it was specially excepted from that lease, and thus became an advowson in gross. See other cases to the same effect, Viner, "Grants," I. a, pl. 5.

Feoffment of a manor (except and reserved two acres to the feoffor for his life only), habendum before excepted to the feoffee in tail. *Held*, that the two acres did not pass: *Wilson* v. *Armorer* (1670), 2 Keble, 642, 643, 667, 719.

Parcels mentioned by implication.

Of course the rule does not apply where the thing newly mentioned in the habendum is impliedly mentioned in the premises.

"If one grant a manor, habendum the manor with the advowson

appendant to the manor, or if one grant a reversion of land, by the name of a reversion, in the premises, habendum the land itself; in both these cases the deed is good, and the advowson and reversion will pass, [for they were in effect and in point of law included in the former description]:" Shep. Touch. 76; Br. Ab. 342 b, pl. 73.

Conveyance of land, with the right to use a wall, to A., subsequent conveyance by A. of the land, habendum "with the appurtenances." *Held*, that the right to use the wall passed: *Renwick* v. *Daly* (1877), Ir. R. 11 C. L. 126.

If there is no habendum, the grantee takes the estate limited in the premises.

If no habendum, grantee takes estate mentioned in the premises.

"If a man by deede give lands to another and his heires without more saying this is good, if he put his seale to the deede, deliver it and make livery accordingly:" Co. Litt. 7 a.

"An estate may be made by a deed without any habendum at all. As if one give or grant land to another and his heirs, without any more words in the deed, or if one give or grant land to another and limit no estate, without any habendum in the deed, and seal and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made:" Shep. Touch. 75.

"The habendum, it is obvious, cannot be requisite in those deeds which operate merely by declaration of use, as an appointment, a covenant to stand seised, or a bargain and sale; though it commonly occurs in the latter. Nor in a common law conveyance is it absolutely necessary, though the deed would be very informal without it, as it is a clause of great importance:" Burton, Comp. s. 515.

"If an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any habendum:" per Abbott, C.J., *Goodtitle* d. *Dodwell* v. *Gibbs* (1826), 5 B. & C. 709 at p. 717; 8 D. & Ry. 502 at p. 509; see also *Kerr* v. *Kerr* (1854), 4 Ir. Ch. R. 493 at p. 497.

If the parcels are set out again in the habendum such setting out is of no effect, unless it is for the purpose of differentiating the estate to be taken by the grantee in

Repeating parcels in habendum is nugatory.

the several parcels, but such setting out may explain the parcels in the premises.

Lease by A., seised of a reversion in fee simple upon a lease for life, to B. of the *reversion*, habendum the *land* for twenty-one years. *Held*, that the words in the habendum explained those in the premises and created a good lease for twenty-one years after the death of the lessee for life: *Throckmerton* v. *Tracy* (1555), 1 Plow. 145; Dy. 124 a. The point of the decision turns upon the fact that the lessee for life had died without having attorned to B.; and hence, as attornment was then necessary to the validity of the grant of a reversion, the lease would have been void if the deed had been held to be a lease of a reversion and not of the land. Attornment was rendered unnecessary by 4 & 5 Anne (1705), c. 16, s. 9.

Where A. leased the manor of D. with all its members and appurtenances, habendum the members of the said manor for a term of years, the Judges were divided in opinion as to whether the manor or only the members thereof were well leased for years. Two Judges held that the manor was well leased for years, but other two held that the manor was only leased at will (that being the effect of the premises), the members only being leased for years; and the latter is stated to be the better opinion: *Anon.* (1563), 2 Benl. & Dal. 57, pl. 3; Moore, 55.

In *Carew's Case* (1585), Moore, 222, "Manwood, C.B., said that where there were in one deed several things granted, and then comes the habendum to limit the estate, if the habendum recites those things over again particularly ['*arrear particularment*'], it does something which is not its office and is superfluous, and therefore all that recital shall be of no effect; but the habendum shall be construed as if there had been no such recital, nor anything beyond 'habendum et tenendum,' but where a deed or demise contains several limitations of estate, *e.g.*, one of certain parcels of the premises for twenty years, and another of other parcels for ten years, or for life, there the certainty of the different habendums is to be regarded, but not so where there is but one habendum." See the annotation of Lord Hale given in Co. Litt. 26 b, note (4).

Therefore a lease of the site of a rectory and all buildings, &c., and tithes thereto appertaining, habendum the said site with the appurtenances, was held to be a good lease of the tithes: *Carew's Case* (1585), Moore, 222; S. C. *sub nom. Carie's Case*, 1 Leon. 281.

Grant to J. N. of an annuity or annual rent of 14*l.* to be issuing out of certain lands, habendum *l'un moyety del ceo* (*viz.*) *7l. del date del dit indenture per 38 ans et habendum l'auter moyety* (*viz.*) *7l. post mortem J. D. durant le terme de 38 ans. Held*, that there were two several rents of 7*l.*, one to commence immediately and the other after the death of J. D.: *Woodley* v. *Beere* (1629), Wm. Jones, 207.

Deed of partition whereby the coparceners conveyed to the releasee to uses certain closes A. and B. and all ways to the said lands belonging or appertaining or therewith usually held, used, occupied or enjoyed, habendum as to closes A. and their appurtenances to the releasee to uses in fee to the use of S. in fee. *Held*, that a right of way which was not strictly appurtenant to A., having been extinguished by unity of possession, passed by the word "appurtenances" in the habendum, interpreting that word by the words in the premises: *James* v. *Plant* (1836), 4 A. & E. 749, reversing 5 B. & Ad. 791.

Person not named in premises cannot take, except in remainder or by way of use.

Where a person is mentioned as grantee in the premises, a person mentioned in the habendum, but not in the premises, cannot take an immediate estate in the land granted, but can take an estate in remainder: Co. Litt. 231 a.; but any person, though not named in the premises or in the habendum, can take any estate, either immediate or in remainder, by way of use declared on the estate limited in the habendum: *Sammes' Case* (1609), 13 Rep. 54.

A. made a lease to B. for forty years if he should so long live; and afterwards by another deed demised the same land to B., habendum to his executors and assigns for forty years after the expiration of the first lease. *Held*, a void lease: *Anon.* (1573), 3 Leon 32, LX. "The premises of a deed is to limit the person who shall have the lease, and the habendum shall not declare the person who shall have it, or the lease, but to declare the estate which shall be in the lease; and it is but a limitation of the estate: and if the premises do not limit the person who shall have it, the habendum shall not give anything to the person, unless it be expressed in the premises what person shall have it: and therefore when he saith habendum to his executors and assigns these words (executors and assigns) are void:" per Mounson, J., *Ibid.* at p. 33. "By the lease of the same land by a new deed, as the case is here, nothing shall pass without an habendum:

and if a lease be made to the lessee, habendum to his executors, he himself hath no estate; and when no estate is limited the person in the premises gains not anything and without the habendum he cannot have anything:" per Harper, J., *Ibid.* at p. 33. "And when by the premises of the deed the parties are not named, the habendum shall never bring in a strange person. . . . When the habendum is to such a person as was not named in the premises of the deed it is but a nugation. . . . The habendum waits upon the grant before; and when he gives an estate in the habendum without limiting of the person in it, then the person named in the premises shall have it; and then when he names a strange person which was not named before in the premises or which hath no capacity as the moon, or such like who are not *in rerum natura* . . . these persons or things named in the habendum are but nugations and void; and then it is like unto the case where no person is limited in the habendum:" per Manwood, J., *Ibid.* at p. 34. "Where no person is named in the habendum, by construction of law he who is named in the premises shall have it: but when the habendum makes express mention of his intent what person shall have it, and another than was named in the premises, then if those cannot have it, the estate limited shall not be carried over to him who was named in the premises:" per Harper, J., *Ibid.* at p. 35.

Leases for lives.

Demise to A., habendum to A., B., C., and D., "*pro termino vitae eorum et alterius eorum successive diutius viventium.*" *Held*, that A. alone took, as B., C., and D., not being named except in the habendum, could only take in remainder, which could not be joint because of the words "*successive*," &c., and in succession they could not take for the uncertainty who should begin: (distinguishing *Anon.* (1577), Dy. 361 a, *supra*, p. 281); *Windsmore* v. *Hobart* (1584), Hob. 313; Godb. 51; Hut. 87; Cro. Eliz. 58; S. C. *sub nom. Anon.*, Ow. 38.

Lease made to two, habendum to them and two others for their four lives. *Held*, that the two mentioned in the habendum only took nothing: *Kirkman and Reignold's Case* (1587), 2 Leon. 1; S. C. *sub nom. Kirkman and Reignott's Case*, 4 Leon. 3. Demise to C., habendum to C. and D. for years rendering rent. *Held*, that D. took nothing: *Reynold* v. *Kingman* (1587), Cro. Eliz. 115.

Release of copyholds.

Release by lord of a manor of a copyhold to the tenant on the roll, habendum to the tenant and G., their heirs and assigns; and livery made according to the intent of the indenture. *Held*, that as G. was not named in the premises, he could take nothing by the habendum, and that the livery made according to the indenture

did not give anything to G., because the indenture as to him was void: *Sammes' Case* (1609), 13 Rep. 54; Ley, 11.

The case of *Tyler* v. *Fisher* has been cited as an authority against the proposition now under discussion on account of the marginal note in the report of the case in Cro. Jac., which states that some of the lessees were not named in the premises, but such statement is not correct, and the case really has nothing to do with the proposition, but is simply a case in which the question for determination was whether the lease was good or void for uncertainty. It was a case in which A. and his wife, by indenture between them and B., demised to B. and his wife and C. their daughter (all of whom were named in the premises), habendum to them "*ut supra dictum est et eorum diutius viventi successive*" for term of their lives. The lease was held good, they to take by way of remainder one after the other: *Tyler* v. *Fisher and Greenwood* (1619), Palm. 29; S. C. *sub nom. Greenwood* v. *Tyber*, Cro. Jac. 563; *sub nom. Greenwood* v. *Tyler*, Hob. 314. The case, however, on writ of error, was compromised on the advice of the Judges, who were of opinion that the decision could not stand with *Windsmore* v. *Hobart, ubi sup.*

Exceptions; frank marriage and grant by copy.

There are two exceptions to this proposition, for a person not named in the premises can take an immediate estate—(i.) in case of frank marriage: 2 Roll. Abr. 67, pl. 17; (ii.) under a customary grant by copy: *Brooks* v. *Brooks* (1617), Cro. Jac. 434; Pop. 125; 2 Roll. Abr. 67, pl. 18. The authorities are collected, Co. Litt. 26 b, note (4).

Remainderman mentioned in habendum only.

A person not named in the premises can take in remainder after a particular estate limited by the habendum to the person named as grantee in the premises: Co. Litt. 26 b, note (4); Burton, Comp. s. 518.

Thus, a grant to B., habendum to B. and the heirs of his body, and if B. died without heirs, remainder to J., was held good: *Veners* v. *Abbot of Fesch*, Y. B. 8 Edw. II. (1314), 267.

Lease by deed poll to A., habendum to A., his wife, and his daughter "*successive sicut scribuntur et nominantur in ordine.*" *Held*, a good remainder to the daughter: for the words "*sicut*, &c., *in ordine*" made it sufficiently certain, though a lease to three habendum *successive* would not be good, for uncertainty: *Grubham's Case* (1613), 4 Leon. 246: distinguishing *Windsmore* v. *Hobart, ubi sup.*

Lease to A., habendum to A. and his wife for their lives "*et eorum diutius viventi successive uni post alterum sicut scribuntur et nominantur in ordine.*" *Held*, a good remainder to the wife: *Wheadon* v. *Sugg* (1614), Cro. Jac. 372.

The Real Property Amendment Act, 1845 (8 & 9 Vict. c. 106), s. 5, which enacts that in indentures executed after October 1st, 1845, "an immediate estate or interest in any tenements or hereditaments . . . may be taken, although the taker thereof be not named a party to the indenture," does not affect this rule.

Grantee named in premises must take some estate.

Where a person is mentioned as grantee in the premises he must take some estate, though he is not mentioned in the habendum.

A *feme covert* by deed executing a power of appointment appointed to such children of her sisters as should be living at the death of her and her husband or the longest liver, habendum to such children of her sisters as should be living at her decease. *Held*, that a child born after her own but before her husband's death took, "for the office of the habendum is to ascertain the quantity and quality of the estate:" *Cochin* v. *Heathcote* (1772), Lofft, 190. It was, however, held in a case in which there was a lease to husband and wife, habendum to the husband for thirty years, that the wife took nothing: *Baldwin* v. *Mortin* or *The Earl of Cumberland's Case* (1589), Owen, 48; probably on the ground that such estate as she took under the premises vested in her husband.

If express limitations in both premises and habendum, the latter will be treated as explanatory, or, if repugnant, rejected.

If words of limitation are added to the grantee's name both in the premises and in the habendum, the limitation in the habendum will, if possible, be considered as explanatory of that in the premises; but if the limitations are repugnant, the estate given by the premises cannot be abridged by the habendum.

Mere mention of grantee in premises is not a life estate.

This rule only applies where there are words of limitation added to the grantee's name in the premises. If there is no such addition, though some of the cases speak of an estate for life in the grantee being implied by the mention of his name in the premises, the better opinion is that there is no such implied life estate; hence the mere mention of the grantee's name in the premises does not give him any estate inconsistent with the estate limited by the habendum, whatever that estate may be.

"For to the intent of some, if a man letteth land to another for life and after confirm his estate which he hath in the same land to have and to hold *his estate* to him and his heirs, this confirmation as to his heirs is void, for his heirs cannot have his estate, which was not

but for term of his life. But if he confirm his estate by these words to have *the same land* to him and to his heirs this confirmation maketh a fee simple in this case to him in the land:". Littleton, s. 524. "Wherein is to be noted that the habendum and the premises do in substance well agree together, and that the habendum may enlarge the premises but not abridge the same:" Co. Litt. 299 a.

"The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be 'to A. and the heirs of his body' in the premises, habendum 'to him and his heirs for ever,' or *vice versâ*, here A. has an estate tail, and a fee simple expectant thereon. But had it been in the premises 'to him and his heirs,' habendum 'to him for life,' the habendum would be utterly void; for an estate of inheritance is vested in him before the habendum comes, and shall not afterwards be taken away or devested by it:" 2 Bl. Com. 298.

Estate may be explained but not abridged.

"But a modification introduced by the habendum is permitted to take effect if it is so far consistent with the language of the premises that its admission does not make any part of the language simply void or nugatory. In such cases there is not, properly speaking, a repugnancy between them:" Challis, R. P. (2nd ed.), p. 379.

"So that the habendum is the only proper part of a fine or deed by the law designed for the limitation of the estate, and the estate limited by the habendum is the estate which the fine or feoffment conveys, if not contradictory to the premises. And this all books agree, that it is the office of the premises to name the grantor and grantee and the thing granted, that the office of the habendum is to limit and express the estate granted, that the habendum shall never be controlled by the premises, unless that the premises are particular, plain, and certain in the limitation of the estate, and the habendum repugnant thereunto, but if the premises be not certain and particular in expressing the estate granted, but general or incertain or subject to doubtful and various constructions, that then in all such cases the habendum, according to its office, shall govern, direct, or enlarge that which is mentioned in the premises, and the estate which passes is according to the habendum. . . . Where the words in the premises are capable of divers constructions, the habendum, being certain and particular, shall govern those doubtful words:" per Pollexfen, *arguendo*, *Pigot* v. *Salisbury* (1674), Pollexf. 146 at pp. 150, 151.

"The office of the habendum is to explain, limit, and declare the *quantum* of the estate which is to pass by the deed. It has never been disputed but that it will carry the limitation of the estate farther than the premises of the deed did. If a man gives an estate to A. for life, habendum to him and his heirs, a fee simple clearly passes. On the other hand, it is clear that the habendum never abridges the estate granted by the premises of the deed; it may indeed alter and vary it. As if a man grants an estate to A. and B., to have and to hold to A. for life, the remainder to B., the premises of the deed in that case will be controlled by the habendum:" per Verney, M.R., *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46 at p. 47.

Estate may be altered but not abridged.

Of course, part of the habendum may be explanatory of the limitation in the premises, while other part may be repugnant and may have to be rejected: *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663; stated *infra*, p. 296.

Premises explained.

In the following cases the estate limited in the habendum explained that in the premises.

Grant in frank-marriage (which was equivalent to a grant in special tail: see Litt. ss. 17, 19 and 20), habendum to the said John and Joan *et haeredibus*. *Held*, to be a grant in fee simple: Y. B. 45 Edw. III. (1371), 19, 20, pl. 22. This case is inconsistent with *Blaunket* v. *Simonson*, Y. B. 2 Edw. II. (1308), 29 (wrongly numbered 26); 17 Selden Society Publications, p. 126, where a similar grant was held to be a grant in frank-marriage only.

"Land is given to one and his heirs male in the premises, habendum to him and the heirs male of his body, this is only an estate tail, notwithstanding the premises were a fee simple:" *Throgmorton* v. *Tracey* (1555), Dyer, 124 a at p. 126 b, pl. 50.

Heirs taking as special occupants.

Grant of a rent-charge to A. and his heirs, habendum to A. for life and for the lives of his wife and two daughters. *Held*, that after the death of A. his heir took during the three other lives, not as "heir by descent, but as his heir *nominatim*, and as by way of limitation only, and not in any other manner, he is to have it as heir by force and virtue of the grant, and not as by descent, but by way of limitation, and that for to prevent an occupancy:" per Flemming, C.J., *Bowles* v. *Poor* (1611), 1 Buls. 135 at p. 137; S. C. *sub nom. Bowles* v. *Poore*, Cro. Jac. 282. But according to the latter report it was held "that the heir shall have this rent as a party specially nominated, and as heir by descent, although it be not properly an estate descendible."

Demise by a prebendary to A. and his heirs, habendum to him

and his heirs for three lives. *Held*, good against the lessor's successor, "for the habendum expounds the premises, and there's no repugnancy, for the lessee and his heirs shall take as in the premises, but shall take only for three lives, as in the habendum:" *Pilsworth* v. *Pyet* (1671), T. Jones, 4.

Habendum enlarging premises.

"If a man in the premises give land to another and the heirs of his body, habendum to him and his heirs for ever, he takes an estate tail and a fee simple expectant:" Co. Litt. 21 a. (It is said in *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46 (at p. 48) that it is fee simple; possibly Coke's opinion may be supported on the ground that estates in tail and in fee may co-exist in the same person.)

"Heirs" in the premises explained to mean "heirs of the body."

"If a man gives lands to one and his heirs, habendum to him and the heirs of his body, he shall have but an estate in tail and no fee expectant:" *Altham's Case* (1610), 8 Rep. 150 b at p. 154 b; see Co. Litt. 21 a; Preston, Shep. Touch. 102, 113. In *Turnman* v. *Cooper* (1618), Cro. Jac. 476; S. C. *sub nom. Thurman* v. *Cooper*, 2 Roll. Rep. 19, 23 and Pop. 138; *sub nom. Jermyn and Cooper's Case*, Godb. 272; these words were held to give an estate tail with a remainder in fee; but in that case the construction was made on the whole deed, which was inconsistent with an estate tail only being intended.

Special occupant explained.

Owner of rent-charge *pur autre vie* grants to "A., his executors, &c., habendum to A., his heirs and assigns," during the lives. *Held*, that the heir took, the habendum being good, because "it is considered as the same kind of estate whether a grant of that sort is made to a man and his heirs, or whether it is made to a man and his executors; it follows from thence that when one of these limitations is in the premises of the deed and the other of these limitations is in the habendum, the habendum shall take place:" *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46.

Estate *pur autre vie* and term restricted.

In *Earl of Derby* v. *Taylor* (1801), 1 East, 502, an estate *pur autre vie;* and in *Burton* v. *Barclay* (1831), 7 Bing. 745, a term; granted by the premises were restricted by the habendum (in each of these cases the facts were somewhat special).

A., seised in fee of certain lands, leased them for three lives at a rent with covenant for perpetual renewal. Subsequently by a settlement he granted and conveyed the said lands to B. and C. (trustees) and the survivor and the heirs of such survivor, habendum to B. and C., and the survivor and the heirs of such survivor for the life and lives of the three *cestuis que vie*, and of every such other person and persons as should be added by virtue of the covenant for perpetual

renewal, to the use, in the events which happened, of D. and the heirs male of her body. *Held*, that the settlement operated as a grant by A. of the reversion, and that D.'s estate was a *quasi*-tail therein: *Lynch* v. *Nelson* (1870), Ir. R. 5 Eq. 192.

Void habendum.

Even if the habendum is void, it may be looked at together with other parts of the deed for the purpose of qualifying the estate limited by the premises: *Goshawke* v. *Chickell* (1629), Wm. Jones, 205; *Hagarty* v. *Nally* (1862), 13 Ir. C. L. R. 532.

Demise to A., his wife and B., habendum to A. for eighty years, if he so long live, and if he dies within the term, remainder of the term to A.'s wife and B., if they so long live. *Held*, good, and that all the interest in the term was in A., and nothing in the others till after his death: *Anon.* (1561), Moore, 43, pl. 133.

Habendum rejected.

In the following cases the estate limited in the habendum being less than that limited in the premises, or repugnant to some rule of law, the habendum was rejected.

"If the grant is to one and his heirs, habendum for life, the habendum is void because it gives a lesser estate. . . . If a man grants to another an annual rent of 20*s*. payable yearly at the feasts of the Annunciation of Our Lady and of St. Michael, habendum for a day, this is a void habendum, because the premises of the deed grant an annual rent and payable at two days, and now by the habendum it shall not be annual nor payable at any day, and therefore it is repugnant:" *Throckmerton* v. *Tracy* (1555), 1 Plow. 145 at p. 153 (*arguendo*).

Habendum *in futuro*.

In *Lilley* v. *Whitney* (1567), Dy. 272 a, pl. 30, where a term was assigned to A., habendum to him and his assigns after the death of the grantor, the habendum was rejected.

On the same principle, part of the habendum was rejected in *Underhay* v. *Underhay* (1591), Cro. Eliz. 269, in which case a demise was made habendum to lessee for life, "which said term shall begin" after the determination of an existing lease for three lives; and it was held that the lease was good, for the estate was fully limited before the words, "which said term shall begin," which therefore had no effect and were rejected.

A., in whom the reversion upon an estate for life was vested, granted the reversion to B., habendum the said reversion after the death of the tenant for life. *Held*, that the reversion passed immediately: for if the words, "after the death of the tenant for life," could have had any operation they would have been repugnant to the grant of the reversion contained in the premises: *Dashper* v. *Milburn* (1591), 1 Anderson, 284.

A. by one indenture conveyed freeholds to B. and his heirs, habendum after the death of A. to B. and the heirs of his body, and by another indenture other freeholds to B. and his heirs, habendum after the death of A. to B. and the heirs male of his body. *Held*, that "although the habendum of a future freehold be void, yet the grant in the premises being expressly to him and his heirs, the indenture shall enure upon the premises and shall pass the estate to the vendee directly by the premises:" *Carter* v. *Madgwick* (1692), 3 Lev. 339.

In *Jerman* v. *Orchard* (1695), Skin. 528 (see p. 542); S. C. *sub nom. Germain* v. *Orchard*, Holt, 331; 1 Salk. 346; *sub nom. Jermyn* v. *Orchard*, Show. P. C. 199, where a term was assigned to B., her executors, &c., habendum after the death of the grantor and his wife, the habendum was rejected, and the assignee took the estate given by the premises.

A. conveyed freeholds to B. and his heirs, habendum to B., his heirs and assigns after the death of A.; the habendum, which was void as giving an estate *in futuro*, was rejected: *Goodtitle* d. *Dodwell* v. *Gibbs* (1826), 5 B. & C. 709; 8 D. & Ry. 502.

Assignment of a ship in course of building to A., habendum to A., when it shall be complete. *Held*, that the habendum might be rejected: *Reid* v. *Fairbanks* (1853), 13 C. B. 692.

Grant to heirs habendum for life.

Where Queen Elizabeth granted a manor to B. and his heirs (in the premises of the letters patent) to have and to hold the said manor to B. and his assigns (leaving out heirs in the habendum), the fee of the manor did pass by the premises of the letters patent, and the habendum was void; for the premises were certain enough to pass the fee simple, and the omission of heirs in the habendum should not overthrow that which was certain in the premises: *Auditor's King's Case*, cited in *The Earl of Rutland's Case* (1608), 8 Rep. 55 a at p. 56 b.

In *Goshawke* v. *Chickell* (1629), W. Jones, 205; S. C. *sub nom. Goshawke* v. *Chiggell*, Cro. Car. 154, where a term was assigned by J. to his daughter Hester, habendum to J. and his wife for their lives with remainder to Hester till her marriage and birth of issue, and afterwards to Hester, her executors, &c., for the residue of the term, provided that if Hester died before being married and having lawful issue the assignment should be void, the habendum was rejected, and Hester took the estate given by the premises, but the habendum was used to assist in interpreting the proviso.

A., tenant for years, in whom was also vested a remainder *pur autre vie* in the land, granted the land and all his estate to B. and

C., habendum for sixty years. *Held*, that by the grant of all his estate his remainder passed, and the habendum was repugnant: *Bernard* v. *Bonner* (1648), Aleyn, 58.

Grant to heir habendum to assigns.

Demise to Hannah Timmis, her heirs and assigns, habendum to Hannah Timmis and her assigns for and during the natural life of George Timmis. *Held*, that the grant in the premises was explained by the habendum to be an estate *pur autre vie*, and that the words in the habendum, "and her assigns," which would have made the lands to pass on the death of the grantee to her executors, should be rejected as being repugnant to the grant to her, her heirs and assigns in the premises, and that the grantee's heir was entitled after her death as special occupant: *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663.

R., being tenant for life of a house by deed of 10th November "granted, demised, and leased to J., his executors, administrators and assigns," the house, habendum "to J., his executors, administrators, and assigns, from the 13th November for the term of R., for the term of his natural life." *Held*, that having regard to the interest which the grantor had, there was in the premises an express grant of the life estate *in praesenti*, which was not controlled by the habendum: *Boddington* v. *Robinson* (1875), L. R. 10 Ex. 270. It is doubtful whether this case can be supported; see Challis, R. P. (2nd ed.), p. 98.

Where one limitation takes effect on delivery but the other does not.

Where the estates limited in the premises and the habendum are not the same, and some further act, besides the delivery of the deed, is necessary to perfect one of them, while the other takes effect by the delivery alone, then the latter estate only is effectually limited.

In *Baldwin's Case* (1589), 2 Rep. 23 a, land was demised to A. and B. and the heirs of B., habendum to them for ninety-nine years from the date of the indenture; no livery of seisin was made. It was held, "*First*, when to things which take their essence and effect by the delivery of the deed without other ceremony, and which lie in grant, there, in such limitation as in the case at Bar, the habendum was repugnant and void; as if a man grants rent or common, &c., out of his land, by the premises of the deed to one and his heirs, habendum to the grantee for years, or for life, the habendum is repugnant; for a fee passeth by the premises, by the delivery of the deed, and therefore the habendum for years, or life, is void. *Second:* If one by deed grants a rent *in esse*, or a seignory, in the premises to one and his heirs, habendum to the grantee for years or life; although another thing, or ceremony, is requisite, that is to say,

attornment, besides the delivery of the deed, yet, forasmuch as the thing lieth in grant, and both estates, that is to say, as well the estate in fee as the estate for years or for life, ought to have one and the same ceremony, that is to say, attornment, to pass it, as a seignory, &c., and for this cause the habendum, in such case, is repugnant and void. *Third:* When a man gives land by deed in fee by the premises, habendum to the lessee for life, there the habendum is void, as hath been said; for one and the same ceremony, *scil.* livery, is requisite to both the estates; and therefore, when livery is made according to the form and effect of the deed, it shall be taken strongest against the feoffor, and more for the advantage of the feoffee; and the habendum in such case is void, and till livery be made, the feoffee hath but an estate at will. *Fourth:* When to the estate limited by the premises, a ceremony is requisite to the perfection of the estate, and to the estate limited by the habendum nothing is required to the perfection and essence thereof, but only the delivery of the deed, there, although the habendum be of a lesser estate than is mentioned in the premises, the habendum shall stand, as in the case at the Bar: to the fee simple limited by the premises, it is requisite to have livery and seisin; and till delivery be made, nothing shall pass but an estate at will (if the deed had not gone farther), and therefore the habendum for years is good presently by the delivery of the deed, and so it appeareth it was the intent of the parties that it should take effect, by the delivery of the deed, for years:" *Ibid.* 2 Rep. 23 a; S. C. *sub nom. Baldwyn* v. *Marton*, 1 Anders. 223, ca. ccxlii.

The necessity for attornment was abolished by 4 & 5 Anne (1705), c. 16, s. 9, and that for livery by 8 & 9 Vict. (1845), c. 106, s. 2, and consequently the case, if it now arose, would be decided according to the third, and not according to the fourth *dictum*.

CHAPTER XVI.

LIMITATIONS TO HEIRS AND HEIRS OF THE BODY.

Grant in Fee Simple: "Heirs," or, since 1881, "Fee Simple" necessary: Exceptions, The King; Corporations; Releases; Vesting Declarations; Reference: Qualified Fees: Determinable Fees: Conditional Fees: Estates Tail: "Heirs," or, since 1881, "Tail" necessary: "Of the Body" Implied, or Supplied by Context: Fee Simple cut down to Fee Tail by gift over: Estates in Special Tail or Tail Male or Female: Begotten includes to be begotten: "Heirs" or "Heirs of Body" extended by parenthesis to all Children: Fees cannot be made Inalienable: Grant to "Heirs" of Deceased Person: "Heirs" is Heir at Law: To "Heirs Male" of Deceased Person: Grant in Remainder to "Heirs" of Living Person: To "Heirs" of Grantor: Grant to "Heirs of Body" of Deceased Person: To "Heirs Male of Body" of Deceased Person: Grant in Remainder to "Heirs of Body" of Living Person: Rule in Shelley's Case: "Heirs" necessary: Estate in Ancestor by Implication: Both Limitations must be in same Instrument: One Limitation Legal, other Equitable: "Heirs of Body" meaning Children: Limitation to A. for Life, Remainder to "Heir" or "Heir of his Body": Equitable Limitations in Executed Trusts construed in same manner as Legal Limitations: Personalty given to "A. and his Heirs," or "Heirs of A.," or "Heirs" in substitution for A., or "A. and the Heirs of his Body," or "Heirs of Body of A."

It now becomes necessary to consider the effect of the ordinary limitations contained in deeds, and as the most important limitation is that to a man and his heirs, it is proposed to consider that first. The estate conferred by a limitation to A. and his heirs differs according to the estate which the grantor has.

Grant to "A. and his heirs" by owner in fee simple;

A grant by the owner of an estate in fee simple of lands, tenements, or hereditaments "to A. and his heirs," or "to A., his heirs and assigns," or "to A., and the

heirs of A.," or " to A., and the heirs and assigns of A.," vests the fee simple in A. as a purchaser.

A grant by the owner of an estate in fee tail of lands, tenements, or hereditaments " to A. and his heirs," not perfected by enrolment, vests a base fee in A., which base fee is liable to be determined after the death of the grantor by the entry of the person entitled on his death: Challis, R. P. (2nd ed.), pp. 293, 302. by owner in fee tail;

A grant by the owner of a life estate of lands, tenements, or hereditaments " to A. and his heirs " vests an estate *pur autre vie* in A., and A.'s heir, on A.'s death during the life without having disposed of his estate, is special occupant, but is chargeable with A.'s debts: Challis, R. P. (2nd ed.), 325 *et seq.* by owner for life;

A lease for years or at will, or an assignment of a term of years, " to A. and his heirs " vests the term in A.; on his death during the term, the term vests in his legal personal representative and not in his heir, who has no interest whatever in the term: Litt. s. 740; Co. Litt. 388 a; Shep. Touch. 271, 469; 1 Prest. Est. 31; *Anon.* (1586), Godb. 42, pl. 48. The word " heirs " is in fact rejected as repugnant. by owner of term or by way of lease.

" If a man . . . will let . . . lands or tenements to another to have and to hold to him and to his heirs at the will of the lessor, these words (to the heirs of the lessee) are void: " Litt. s. 82.

If A. is a corporation sole, and a lease is made or assigned to him and his "successors," the word " successors " is rejected, " yet his executors or administrators shall have it in *autre droit*:" Co. Litt. 46 b. Terms limited to corporations sole.

There is no way by which a term can be vested in a corporation sole, so as to shift at law to his successors.

In deeds prior to 1882 no estate in fee simple could be created without the word " heirs," and in deeds since 1881 no estate in fee simple can be created without the word "heirs," or, under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51, the words "in fee simple." The word "heir" is not sufficient. The words " in fee " are not sufficient. " Heirs " necessary.

" If a man " before 1882 " would purchase lands or tenements in

fee simple, it behoveth him to have these words in his purchase, 'to have and to hold to him and to his heirs:' for these words 'his heirs' make the estate of inheritance. For if a man purchase lands by these words, 'to have and to hold to him for ever;' or by these words, 'to have and to hold to him and his assigns for ever;' in these two cases he hath but an estate for term of life, for that there lack these words, 'his heirs,' which words only make an estate of inheritance in all feoffments and grants:" Litt. s. 1.

"A. in fee simple."

"If one grant," before 1882, "to J. S., to have and to hold to him in fee simple, or in fee tail, without saying 'to him and his heirs,' or, 'to him and his heirs males,' or the like, this is but an estate for life and no more. . . . So if one [by deed or fine] grant land to J. S., to have and to hold to him and his seed, or to him and his issue generally without more words, by this [grant] is made only an estate for life:" Shep. Touch. 106.

"A. and his seed or issue."

Bastard.

The rule applies in the case of a bastard, all of whose heirs must be his issue: Co. Litt. 3 b; per Holt, C.J., *Idle* v. *Cook* (1705), 1 P. Wms. 70 at p. 78; 2 Ld. Raym. 1144 at p. 1152; 11 Mod. 57 at p. 58.

"Issue, seed, children, offspring."

"As if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children* or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs:" 2 Blackst. Com. 115.

"For ever."

"The word, 'heirs,' is necessary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life:" 2 Blackst. Com. 107.

"Successors."

A grant to a natural person and his successors gives only an estate for life: Shep. Touch. 106.

"Heir" insufficient.

"And it is to be observed that every word of Littleton is worthy of observation. First (heires) in the plural number, for if a man give land to a man and to his heir in the singular number he hath but an estate for life, for his heir cannot take a fee simple by descent because he is but one, and therefore in that case his heir shall take nothing:" Co. Litt. 8 b; *Waker* v. *Snowe* (1620), Palm. 359; *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193. Mr. Hargrave in his note to the passage in Coke says: "According to many authorities, 'heir' may be *nomen collectivum* as well in a deed as a will, and operate in both in the same manner as 'heirs' in the plural number." But the cases that he cites are all cases of wills, with the possible exception of the case in Godbolt, as to which it does not appear whether it refers to a will or a deed, and where there is only a *dictum*, and of the passage in

Clarke and Daye's Case (1595), 1 Roll. Abr. 832, K. 1; 10 Vin. Abr. 234, K. 1, which appears to be a *dictum* in a case on a will as to the effect of a deed: the *dictum* moreover is not found in the reports of the case in Cro. Eliz. 313 and Moore, 593.

"Heir or heirs."

But "heir or heirs" *probably* give a fee: *Bony* v. *Taylor* (1614), 2 Roll. Abr. 253; 16 Vin. 213, Parols, H., pl. 3, in which case, however, there were further words of limitation. The case is stated *infra*, p. 329.

"His" omitted.

If a man give land unto two, to have and to hold to them two *et haeredibus*, omitting *suis*, they have but an estate for life, for the uncertainty: Y. B. 22 Hen. VI. (1443), 15, pl. 28. "But it is said if land be given to one man, *et haeredibus*, omitting *suis*, that notwithstanding the fee simple passeth:" Co. Litt. 8 b; see also Y. B. 19 Hen. VI. (1440), 73, pl. 2; *Colthirst* v. *Bejushin* (1550), Plow. 21 at p. 28; Shep. Touch. 101.

"A. or his heirs."

An immediate limitation to "A. *or* his heirs" gives an estate for life only to A.: Co. Litt. 8 b, 214 a; *Mallory's Case* (1601), 5 Rep. 111 b at p. 112 a; but such limitation in remainder is, it is submitted, an alternative limitation, viz., a vested remainder to A. for life, and a contingent remainder in fee simple to the heir of A., which becomes vested if A. dies before the prior estate determines.

Word "heirs" rejected.

The context may show that the word "heirs" is to be rejected. Thus it is rejected in limitations of chattel interests; *supra*, p. 299.

By a marriage settlement freeholds were vested in trustees "to hold to the use of A., his heirs and assigns, from the perfection of these presents for and during the term of his natural life;" then followed a limitation to trustees to preserve, &c., and other usual provisions in a strict settlement. *Held*, that A. took an estate for life only: *Re Hammersly* (1861), 11 Ir. C. R. 229; affirmed on another point, 12 Ir. C. R. 319.

"Fee simple" necessary, "fee" insufficient.

If reliance be placed on sect. 51 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is necessary in order to pass the legal estate in fee simple by deed, in the absence of the word "heirs," to use the actual words of limitation mentioned in that section, namely, "in fee simple": a conveyance "in fee" omitting the word "simple" does not pass the legal estate in fee simple: *In re Ethel and Mitchell and Butler's Contract*, [1901] 1 Ch. 945.

"Assigns."

The word "assigns" in the expression "heirs and assigns" has no operative value and is mere surplusage, it cannot be construed as giving a power of appointment: *Brookman* v. *Smith* (1871), L. R. 6 Ex. 291 at p. 306; *Milman* v. *Lane*, [1901] 2 K. B. 745 (both cases on wills).

Exceptions.

There are exceptions to the rule that the word "heirs" is necessary.

The King.

First. The King may take a fee simple by deed enrolled without the word "heirs" or "successors:" Co. Litt. 9 b; Shep. Touch. 101; 2 Blackst. Com. 109; in such case he takes as a body politic. He may also take "to him and his heirs," in such case he takes in his capacity as a man; or he may take "to him and his heirs Kings of England," or "to him and his successors Kings of England," in which cases he takes in his capacity as a body politic; in every case he takes a fee simple: *Willion* v. *Berkley* (1562), Plow. 223 at p. 234.

Frank-marriage.

Second. "If a man had given land to a man with his daughter in frank-marriage generally a fee simple had passed without these words (his heirs):" 10 Vin. Abr. Estate, K. 2, pl. 5, p. 235, citing Co. Litt. 9 b, 10 a; but frank-marriage is stated to be equivalent to a grant in special tail in Litt. ss. 17, 19 and 20; Co. Litt. 9 b; and frank-marriage is distinguished from fee simple in *Blaunket* v. *Simonson*, Y. B. 2 Edw. II. (1308), 29 (wrongly numbered 26); 17 Selden Society Publications, p. 126; Y. B. 45 Edw. III. (1371), 19, 20, pl. 22.

Frank-almoine.

Third. A gift to a corporation sole in frankalmoine passed the fee without any words of limitation: Co. Litt. 9 b, 94 b; 1 Roll. Abr. 833, L. 5 and 6; Shep. Touch. 101; 2 Blackst. Com. 109.

Peerages by writ.

Fourth. "In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word 'heirs,' for they are implied in the creation, unless it be otherwise specially provided: but in creations by patent which are *stricti juris*, the word 'heirs' must be inserted, otherwise there is no inheritance:" 2 Blackst. Com. 108.

Corporation aggregate.

Fifth. A gift to all a corporation aggregate, where all the corporation can take, passes the fee without any words of limitation: Y. B. 11 Hen. IV. (1410), 84, pl. 34; Y. B. 39 Hen. VI. (1460), 13, pl. 17; Y. B. 11 Hen. VII. (1495), 12, pl. 36; and Y. B. 27 Hen. VIII. (1536), 15, pl. 6; Co. Litt. 9 b, 94 b.; 2 Blackst. Com. 109; but if only one of the corporation can take, the word "successors" appears to be necessary: Co. Litt. 94 b.; 1 Roll. Abr. 832.

Corporation vacant.

As to the effect of a grant made while there is no capable member of a corporation aggregate, or while a coporation sole is vacant: see *Holden* v. *Smallbrooke* (1668), Vaugh. 187 at p. 199: Litt. s. 443; Co. Litt. 264 a.

Releases.

Sixth. The rule does not apply to certain releases: "First, when an estate of inheritance passeth and continueth, as if there be

three coparceners or joint tenants, and one of them releases to the other two, or to one of them, generally, without this word 'heirs'; . . . secondly, when an estate of inheritance passeth and continueth not, but is extinguished, as when the lord releaseth to the tenant, or the grantee of a rent, &c., release to the tenant of the land generally all his right, &c., hereby the seignory, rent, &c., are extinguished for ever, without these words 'heirs': thirdly, when a bare right is released, as when the disseisee release to the disseisor all his right he need not . . . speak of his heirs:" Co. Litt. 9 b. See *Ibid.* 193 a; Shep. Touch. 327; *Estoft's Case* (1567), Dyer 263, at pl. 34; 1 And. 45, ca. cxiv.; Bendl. 32, pl. 129; Benl. & Dal. 195, pl. 232.

Grants of rents on partition.

Seventh. "If partition be made between coparceners of lands in fee simple, and for owelty of partition one grant a rent to the other generally, the grantee shall have a fee simple without this word 'heirs':" Co. Litt. 10 a; *Browning* v. *Beston* (1555), Plowd. 131 at p. 134.

Fine and recovery.

Eighth. An estate in fee simple could be created by a fine *sur conusans de droit, come ceo,* &c., or by a recovery without the word "heirs": Co. Litt. 9 b; 5 Cru. Dig. tit. xxxv. c. 3, s. 13, p. 95; or by a fine *sur cognizance de droit tantum*: 5 Cru. Dig. tit. xxxv. c. 3, s. 19, p. 96.

Bargain and sale, before Statute of Uses.

Ninth. An estate in fee simple could be created by a bargain and sale without the word "heirs" before the Statute of Uses, 27 Hen. VIII. (1535) c. 10: Y. B. 27 Hen. VIII. (1536), 5, pl. 15, and 7, pl. 21 at p. 8; 10 Vin. Abr. tit. Estate, K. 2, pl. 1, 2, pp. 234, 235; *Corbet's Case* (1600), 1 Rep. 83 b at p. 87 b; *Shelley's Case* (1581), 1 Rep. 93 b at p. 100 b. Probably the reason of this was that prior to the Statute of Uses the estate of the *cestui que use* was only an equitable interest.

Vesting declarations.

Tenth. Declarations vesting property in trustees under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 34, or the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12.

Reference.

Eleventh. A fee may be limited by words of reference: Co. Litt. 9 b; *Garde* v. *Garde* (1843), 3 Dr. & War. 435; 2 Con. & L. 175.

Thus a fee simple can be limited by deed by reference to words contained in a will, though the word "heirs" is not used in the will, if the words in the will are sufficient to create a fee simple: *ex. gr.* conveyance by deed to the uses of a will.

Leaseholds were settled upon trusts under which two persons became absolutely entitled to a share as tenants in common; freeholds were subsequently settled upon the same trusts "as near as

the difference of the estates of the trustees and their heirs would admit, to the intent that the rents might be taken and the hereditaments held, sold, conveyed, and assigned, and the produce thereof paid and applied unto such person and persons and in such manner in every respect as was in the settlement of leaseholds expressed and declared of the property therein described." It was held that the two persons were entitled to an equitable fee simple in the freeholds: *Pugh* v. *Drew* (1869), 17 W. R. 988; *Brigg* v. *Brigg* (1885), 33 W. R. 454; 54 L. J. Ch. 464.

Copyholds.

Twelfth. By special custom a surrenderee of copyholds can take a fee simple without the word "heirs": *Thettenwell* v. *Bunney* (1563) and *Browne* v. *Foster* (1584) both cited in *Warne* v. *Sawyer* (1614), 1 Roll. Rep. 48; *Bunting* v. *Lepingwell* (1585), 4 Rep. 29 a at p. 29 b; 2 Prest. Est. 67; Challis R. P. (2nd ed.), p. 195, note.

Corporation sole.

"Successors" necessary.

Thirteenth. In a grant to a corporation sole the word "heirs" is not necessary, the word "successors" being substituted for it: Co. Litt. 8 b; Shep. Touch. 101; 2 Black. Com. 108; and unless the word "successors" is used a life estate only passes, even if the grant be to the corporation and his heirs, or to the corporation in fee simple: Y. B. 9 Hen. V. (1421), 8, pl. 2; Co. Litt. 8 b, 94 b, note (4); 1 Roll. Abr. 832.

In old times grants were made "to God and the church of ——," and neither the word "successors" nor "heirs" was used: Bracton, 286 b; preamble to Act 23 Hen. VIII. (1531), c. 10; Queen Anne's Bounty Act, 1 Geo. I. (1714), c. 10 (in some editions c. 11), s. 21. When the more modern form was introduced there was a good deal of doubt what was the effect of the grant: see Y. B. 11 Hen. IV. (1410), 84 b, pl. 34; Y. B. 12 Hen. VIII. (1520), 8 a; Co. Litt. 94 b; Shep. Touch. 101; 1 Roll. Abr. 833, L. 4; but it is clear the parson has only a qualified fee: Co. Litt. 300 b, 341 b; *Marlborough* v. *St. John's* (1852), 5 De G. & S. 174; *Bartlett* v. *Phillips* (1859), 4 De G. & J. 414; *Ross* v. *Adcock* (1868), L. R. 3 C. P. 655 at p. 664; *Sowerby* v. *Fryer* (1869), L. R. 8 Eq. 417; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552; and in old days he could have no proprietary writ except *juris utrum*, as to which see the article by Professor Maitland on "Frankalmoign in the Twelfth and Thirteenth Centuries," in the Law Quarterly Review (1891), vol. vii., 354 at p. 360.

Fee simple insufficient even since 1882.

A grant to a corporation sole "in fee simple," since 1882, would probably not vest the legal fee in the corporation sole. The words "in fee simple" seem to be substituted by sect. 51 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), for

the word "heirs," and not also for the word "successors," which is not mentioned in the section. Challis (R. P., 2nd ed., p. 197) leaves the point doubtful, but it is the general opinion of conveyancers that the word "successors" is still necessary to grant a fee simple to a corporation sole.

For other exceptions see 10 Vin. Abr. tit. Estate, K. 2, pl. 3 and 8, and L. pl. 4, pp. 235, 236 and 238.

Other exceptions.

> A limitation to A. and his heirs subject to some qualification, of a kind permitted by law, gives rise to a qualified fee.

Limitation to A. and his heirs subject to a qualification.

Such lawful qualification may be of three kinds—(i.) the class of heirs to take may be restricted; (ii.) the estate instead of enduring for ever may be liable to be cut short on the happening of a future event; such a limitation gives rise to a determinable fee; or (iii.) the heirs to take may be restricted to the heirs of the body of a specified person or persons; such a limitation gives rise to a conditional fee at common law and a fee tail under the statute *De Donis Conditionalibus*, 13 Edw. I. (1284), c. 1.

Three qualifications allowed.

The only example of the first class which is given in the books is a grant to A. and the heirs of B., where B. is the ancestor in the paternal line of A.; which, it will be noticed, is not in form a grant to A. and his heirs.

First qualification.

Limitation to A. and heirs of B. his ancestor.

The question as to the nature of the estate conferred by such a limitation, the validity of which is noticed in Littleton, s. 354; Co. Litt. 220 b, is discussed at great length in Challis, R. P. (2nd ed.), c. 19, pp. 241 *et seq.* It seems that B. must be a paternal ancestor of A.

No other qualification of the heirs general is good, for it is a clear rule that—

> If there be added to a limitation to "A. and his heirs" any qualification such as "lawfully issuing" (without stating from whom they are to issue), or "male," such qualification is void and does not cut down A.'s estate from a fee simple.

In limitations to A. and his heirs. No qualification of heirs allowed.

"If a man giveth lands to a man to have and to hold to him and his heires on the part of his mother, yet the heires on the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voide:" Co. Litt. 13 a.

Heirs on the part of his mother.

Heirs male or female.

"If a man give lands or tenements to another, to have and to hold to him and to his heirs males, or to his heirs females, he to whom such a gift is made hath a fee simple, because it is not limited by the gift of what body the issue male or female shall be:" Litt. s. 31; Co. Litt. 13 a.

Eldest heirs.

"A man seised of land in gavelkind gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but the law rejecteth this adjective (eldest):" Co. Litt. 27 a.

A. and his heirs of the body of his father.

"If lands be given to the son and to *his* heirs of the body of his father, the son cannot take as heir of the body of his father, because the grant is to him and to his heirs, &c., and consequently he hath a fee simple:" Co. Litt. 27 a; the words "of the body of his father" being rejected as repugnant.

"Right heirs males." "Heirs males lawfully engendered."

"Right heirs males:" *Doe* d. *Brune* v. *Martyn* (1828), 8 B. & C. 497; 2 Man. & Ry. 485; "heirs males lawfully engendered:" *Abraham* v. *Twigg* (1595), Cro. Eliz. 478; Moore, 424; confer a fee simple.

"Of his body" by context.

But the context may show that such words are to be read as of the body: see *Beresford's Case* (1607), 7 Rep. 41 a, and cases collected *infra*, pp. 310, 311.

Grant by the Crown.

A grant by the Crown to A. and his heirs male is absolutely void: *Lord Lovel's Case*, 18 Hen. VIII. (1526); Br. tit. Patents, pl. 104, cited in the *Case of Alton Woods* (1600), 1 Rep. 40 b at pp. 43 b, 46 a; "for that the King is deceived in his grant, inasmuch as there can be no such inheritance of lands or tenements as the King intended to grant:" Co. Litt. 27 a.

Peerage cases.

In *The Earl of Devon's Case* (1831), 2 Dow & C. 200; 5 Bli. N. S. 220, it was held by the House of Lords that a limitation of a peerage to a man and his heirs male for ever is good, and that the dignity descends in the course so marked out on the ground that a grant of honours is not regulated by the same law as a grant of land. But in the *Wiltes' Peerage Case* (1869), L. R. 4 H. L. 126, it was held first, that the decision of the House of Lords in a peerage case was not binding on the House in subsequent cases, for it was not a judicial decision in the sense in which the decision of the House on an appeal from a Court of Law or Equity is a judicial decision; and, secondly, that a limitation of a peerage to a man and his heirs male for ever was invalid except for the life of the grantee. And it was held, both in that case and in the *Buckhurst Peerage Case* (1876), 2 Ap. Ca. 1, that the Crown could not limit the descent of a peerage in a manner different from that in which real estate can be made

to descend according to the law of the country. In the latter case it was also held that there could be no use or trust in a peerage, and therefore a limitation in a patent adapted from a shifting use of real estate was invalid. There are some observations on the point by Bacon, V.-C., and Mellish, L.J., in *Cope* v. *Earl de la Warr* (1873), L. R. 8 Ch. 982 at pp. 986, n. and 995.

In Scots law, however, it appears that limitations of land and honours to a man and his heirs male are valid: per Lord Chelmsford, L.C., *Wiltes' Peerage Case* (1869), L. R. 4 H. L. 126 at p. 155.

Armorial bearings.

In Co. Litt. 27 a will be found some remarks on a grant of armorial bearings to a man and his heirs male.

Second qualification.

Determinable fee.

In the second class of cases the limitation is made by limiting the estate until the happening of a future event, which *must* be such that it may never happen at all, as, *e.g.*, to A. and his heirs so long as B. has heirs of his body: *Edward Seymor's Case* (1611), 10 Rep. 95 b at 97 b. If the event must happen sooner or later no fee is passed, but the grantee takes either a tenancy at will or a term of years or a life estate.

Estate *pur autre vie.*

Thus the effect of a limitation to A. and his heirs during the life of B., since B. must die, though the date of his death is uncertain, is that A. takes not a determinable fee, but an estate *pur autre vie*, and if A. dies without having disposed of his estate *pur autre vie*, his heir takes it as special occupant and not by descent: *Atkinson* v. *Baker* (1791), 4 T. R. 229; *Doe* v. *Luxton* (1795), 6 T. R. 289; see *infra*, pp. 353, 354.

Determinable fee at common law.

The question whether a fee can be made determinable at common law is discussed in Sanders on Uses, 208, and in Gray on Perpetuities, pp. 18 *et seq.*, where the cases are collected.

The many questions that occur on determinable fees will be found discussed in Co. Litt. 201 a to 237, "Estates upon condition." As to the meaning of "condition," see 2 Fearne, C. R. 3. The cases on the construction of fees made determinable by shifting clauses taking effect under the Statute of Uses are discussed in Co. Litt. 327 a, note; 3 Dav. Prec. 349 *et seq.*

In Challis, R. P. (2nd ed.), pp. 228 *et seq.*, will be found a long list of determinable fees. The determinable fee which is most usually met with is the ordinary limitation in a marriage settlement of realty which limits the lands settled to the use of the grantor and his heirs until the intended marriage shall be solemnised.

Third qualification.

Heirs of the body.

In the third class of cases the heirs are restricted to heirs of the body of a particular person or persons.

Conditional fee in hereditaments not tenements.

A limitation to A. and the heirs of his body of hereditaments, which are not tenements, vests in A. a conditional fee.

Such conditional fee is for practical purposes enlarged to a fee simple on the birth of issue of his body: Co. Litt. 20 a, *Nevil's Case* (1604), 7 Rep. 33 a at p. 34 b; *Stafford* v. *Buckley* (1750), 2 Ves. Sen. 170. The exact nature of the estate is discussed Co. Litt. 19 a, Challis, R. P. (2nd ed.) c. 18., pp. 236 *et seq.*

The learning on the subject is not now of much importance except in the case of copyholds held of manors where there is no custom to entail, for—

Conditional fee in copyholds.

Words which create an estate tail in freeholds, create a conditional fee in copyholds holden of a manor where there is no custom to entail.

The authorities in support of this proposition are *Rowden* v. *Maltster* (1626), Cro. Car. 42; S. C. *sub nom. Royden and Moulster's Case*, Godb. 367; *Pullen* v. *Middleton* (1754), 9 Mod. 483 (where the limitations were equitable, which it was held made no difference); *Doe* d. *Spencer* v. *Clark* (1822), 5 B. & Ald. 458; and *Doe* d. *Simpson* v. *Simpson* (1838), 4 Bing. N. C. 333; S. C. in Exch. Ch. *sub nom. Doe* d. *Blesard* v. *Simpson* (1842), 3 Man. & Gr. 929. The two last are cases on wills.

Estates tail.

With regard to hereditaments which are tenements, the limitation gives rise to the ordinary estate tail, the rules with regard to the creation of which may be thus stated—

Grant to "A. and the heirs of his body" by owner in fee simple;

A grant by the owner of an estate in fee simple of lands, tenements, or hereditaments, which are tenements, "to A. and the heirs of his body" vests an estate tail in A. as a purchaser.

by owner in fee tail;

A grant by the owner of an estate in fee tail of lands, tenements, or hereditaments, which are tenements, "to A. and the heirs of his body," not perfected by enrolment, vests an estate tail in A., but of the nature of a base fee tail which is liable to be determined after the death of the grantor by the entry of the person entitled on his death: Challis, R. P. (2nd ed.), pp. 293, 302.

by owner for life;

A grant by the owner of a life estate of lands, tenements, or hereditaments, which are tenements, "to A.

and the heirs of his body" vests an estate *pur autre vie* in A., and the heir of the body of A., on A.'s death during the life without having disposed of his estate, is special occupant, but is chargeable with A.'s debts: Challis, R. P. (2nd ed.), p. 328.

by owner of term, or by way of lease.

A lease for years or at will, or an assignment of a term of years, "to A. and the heirs of his body" vests the term in A., and on his death during the term the term vests in his legal personal representative, and not in the heir of his body, who has no interest whatever in the term: Litt. s. 740; Co. Litt. 388 a. The words "heirs of the body" are in fact rejected as repugnant.

In deeds prior to 1882 no estate tail could be created without the word "heirs;" and in deeds since 1881 no estate tail can be created without the word "heirs," or, under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51, the words "in tail." The word "heir" is *probably* sufficient. The words "of the body" may be supplied by implication or the context.

"Heirs" necessary.

"In gifts in tail these words (heirs) are as necessary as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words 'heirs,' and that an estate in fee tail is but a cut or restrained fee, it followeth that in gifts in a man's lifetime no estate" (*sc.* estate tail) "can be created without these words 'heirs,' unless it be in case of frank marriage:" Co. Litt. 20 a.

Issue male.

Thus, a limitation to "A. and his issue male of his body," to "A. and for want of issue of his body," remainder over, is not an estate tail: *Nevil* v. *Nevil* (1617), 1 Brownl. & G. 152; *Seagood* v. *Hone* (1634), Cro. Car. 366; *Makepiece* v. *Fletcher* (1735), Com. Rep. 457; *Wheeler* v. *Duke* (1832), 1 Cr. & Mee. 210; 3 Tyr. 61; *Dawson* v. *Dawson* (1850), 13 Ir. L. R. 472. See per Kindersley, V.-C., *Phillips* v. *James* (1865), 2 Dr. & Sm. 404 at p. 411.

"Heir" of body in the singular.

The only case of an estate tail being created by the word "heir" of the body in the singular in a deed is the case 39 Ass. (1365), pl. 20 (cited in Co. Litt. 22 a, and per Hale, C.J., *King* v. *Melling* (1672), 1 Ventr. 228, and per Fenner, J., *Lilly* v. *Taylor* (1590), Owen, 148), where lands were given to a man and his wife, and one heir of their bodies lawfully begotten, and to one heir of the body of that heir

only; and it was held to be tail: see S. C. Bro. Abr. "Estate," pl. 38; *Ibid.* "Tail," pl. 23; Perkins, s. 171 (fo. 36, ed. 1528), where "*tamen quaere*" is added to the citation; Fitzh. Abr. "Tail," pl. 19. The point is discussed in 1 Co. Rep. by Fraser, p. 164, note (Y) (*Archer's Case*); in *Warrick* v. *Warrick* (1745), 3 Atk. 291; *Bayley* v. *Morris* (1799), 4 Ves. 788, and *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193; and in *White* v. *Collins* (1719), Com. Rep. 289, and *Dubber* v. *Trollope* (1764), Amb. 453 (which were both cases of devises).

"Heir *or* heirs of body."

But "heir or heirs of his body" is *probably* tail: *Bony* v. *Taylor* (1614), 2 Roll. Abr. 253, H. 3; 16 Vin. Abr. 213, "Parols," H. 3, in which case, however, there were further words of limitation; the case is stated *infra*, p. 329.

"Of the body" supplied by implication.

The words "of the body" may be supplied by implication or the context.

"De corpore."

"These words are not so strictly required but that they may be expressed by words that amount to as much; for the example that the statute of Westminster Second putteth hath not these words, '*de corpore*,' but these words '*heredibus*,' viz., *Cum aliquis dat terram suam alicui viro et ejus uxori et heredibus de ipsis viro et muliere procreatis.* If lands be given to B., *et heredibus quos idem B. de prima uxore sua legitime procrearet*, this is a good estate in especiall tail (albeit, he hath no wife at that time) without these words, '*de corpore*.' So it is if lands be given to a man and to his heirs which he shall beget of his wife, or to a man, *et heredibus de carne sua*, or to a man, *et heredibus de se*. In all these cases these be good estates in tail, and yet these words, *de corpore*, are omitted:" Co. Litt. 20 b. In *Beresford's Case* (1607), 7 Rep. 41 a (where the words were "and the heirs male of the said A. lawfully begotten"); *Jack* d. *Westby* v. *Fetherstone* (1829), 2 Huds. & Bro. 320 (to the first son of the body of A. and the heirs male of such first son lawfully issuing); *Idle* v. *Cook* (1705), 2 Ld. Raym. 1144 at pp. 1152, 1153, per Holt, C.J.; and Viner, "Estate," T. 5 (his heirs if he shall have heirs *de carne sua*); it was held that there was an estate tail; but where the limitation was to Wm. Cotton *et primogenito filio suo et haeredi masculo et sic de primogenito ad primogenitum dicti* Wm., it was held that these words did not create an estate tail either in William or his eldest son: *Cotton's Case* (1590), 1 Leon. 211; S. C. *sub nom. Smy* v. *June*, Cro. Eliz. 219; *sub nom. Smye* v. *Chown*, 1 Anders. 264; *sub. nom. Anon*, Sav. 712.

"De carne."

"De se."

"If lands be granted to J. S., to have and to hold to him and the

heirs he shall happen to have of his wife; by this gift he hath but an estate tail, and no fee simple:" Shep. Touch. 104.

"Of the body" supplied by context.

Settlement to use of E. for life, remainder to S. in tail male, remainder to F. in tail, remainder to E. in fee, with power to E. to revoke the uses limited to S., and to limit new uses. By deed E. revoked the uses limited "to S. and his heirs male," omitting "of his body," and limited new uses "to S. and his heirs male," omitting "of his body." *Held*, that S. took an estate tail, since, if it were construed a fee simple, it would destroy the remainder limited to F., which E. had not power to do: *Gilmore* v. *Harris* (1685–93), 3 Lev. 213; Skin. 324; Carth. 292.

If a gift be made to A. and his heirs saving the reversion to the donor, A. has an estate tail only: 9 Edw. III. (1335), cited, per Yelverton, *Kene's Case* (1626), Litt. Rep. 4; 2 Fitzh. Abr. "Taile," pl. 21.

Some of the cases in which the words "of the body" are implied are of sufficient importance to be stated as separate rules:—

Limitation over on death without issue.

> A limitation to "A. and his heirs" with a limitation over on his death "without issue" gives A. an estate tail.

The cases are collected *infra*, Chapter on Death without Issue.

Limitation over on failure of heirs of A. to a person who may be his heir.

> A limitation to A. and his heirs, with a limitation over, on failure of the heirs of A., to B., who is capable of being the heir of A., gives A. an estate tail.

A settlor made a conveyance by way of marriage settlement to trustees "in trust for the use of himself for life, then to the use of his wife for life, and then in trust for the use of his first son and the heirs of such first son, and from and immediately after the determination of that estate, in trust for the use of his second, third, fourth, fifth, and all and every other son and sons, and their several and respective heirs, and for default of such issue, then to the use of all and every of his daughter and daughters, and their heirs, to take as tenants in common, and not as joint tenants, and for want of such issue, then in trust for the use of the right heirs of the survivor of himself and his wife for ever." It was held that the sons took successively estates in tail, but that the daughters

took estates in fee simple; Abbott, C.J., and Holroyd, J., gave no reasons for holding that the sons took in tail; but Bayley, J., adopting the argument of counsel, says, "In the first limitation in this deed, the word 'heirs' is necessarily used in the restricted meaning, on account of the subsequent limitation to the second son. For the deed speaks of the determination of the estate of the eldest son, which could not happen if by the word 'heirs' was meant 'heirs general,' for there could be no failure of heirs general to the eldest son whilst the second son remained alive. The same observation will apply to the limitation over to the second, third, and other sons:" *Doe* d. *Littledale* v. *Smeddle* (1818), 2 B. & Ald. 126.

The limitations in a post-nuptial settlement were to A., the husband, for life, remainder to trustees to preserve, remainder to the use of B. the eldest son of the marriage "and to the heirs of the said B., and for default thereof," remainders to the other sons of A. successively in tail male. *Held*, tail in B.: *Wall* v. *Wright* (1837), 1 Dr. & Wal. 1 (Lord Plunket in his judgment approves of *Doe* v. *Smeddle*). See also *Jack* d. *Westby* v. *Fetherstone* (1829), 2 Huds. & Bro. 320; *Shelley* v. *Earsfield* (1662), 1 Rep. in Ch. 206, stated *infra*, p. 339.

Suggested extension of rule as stated.

In *In re Waugh, Waugh* v. *Cripps*, [1903] 1 Ch. 744 (a case on a will), Farwell, J., suggests that the rule ought to be extended as follows:—"If the person to whom the limitation over is made be capable of being the collateral heir of the first devisee, or if the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee on such first devisee's death, the first devisee takes only an estate tail:" p. 747. It appears, however, that in the case in question the rule as stated above would have been sufficient. The limitation being "No. 12 to go to . . . Elizabeth Graham and her heirs, and No. 9 to go to . . . William Graham and his heirs, if either the said Elizabeth or William should die without an heir their share is to go to the survivor's heir or heirs," William and Elizabeth being brother and sister.

In limitations to A. and the heirs of his body, qualification of heirs is allowed.

There may be added to a limitation to "A. and the heirs of his body" the qualification that they shall be begotten on a particular woman, or that they shall be male or female.

This is implied in the quotations from Litt. s. 31; Co. Litt.

13 a; Co. Litt. 20 b; given *suprà*, pp. 306 and 310; and, of course, limitations in special tail and in tail male are quite common, though limitations in tail female do not occur in practice.

Designation of person of whose body the heirs are to be.

The importance of pointing out from what person the heirs are to proceed (see *Idle* v. *Cook* (1705), 1 P. Wms. 70; Holt, 164; 11 Mod. 57; Salk. 620; 2 Ld. Raym. 1144) will appear when the following limitations to a husband and wife are considered; they do not differ much in form, but it will be found in every case that the estate tail vests in that person from whose body the heirs are to proceed.

Heirs *of* the body and heirs *on* the body distinguished.

The distinction between heirs *of* the body, and heirs *on* the body, must be attended to: where "heirs *of* the body of the husband begotten by him *on* the body of the wife:" Co. Litt. 26 a, n. (3); or "A. and his heirs on the body of his wife begotten:" *St. John* v. *Valencia* (1286), 1 Roll. Abr. 837, s. 1; or on the body of any woman whom he may lawfully marry; *Chudleigh's Case* (1595), 1 Rep. 120 a at p. 140 b; S. C. *sub nom. Dillon* v. *Fraine*, Pop. 70 at p. 77; *sub nom. Dillam* v. *Frain*, 1 Anders. 309; are spoken of, the heirs intended are the heirs of the body of the husband, but they are restricted by the words "on the body of the wife" to a particular class of the heirs of the body of the husband, namely, those that he has by her. "Heirs begotten by the husband *of* the body of the wife," mean "heirs of the body of the wife," but they are restricted to the heirs begotten by the husband: Co. Litt. 26 a, n. (3). On the other hand, "heirs begotten by the husband *on* the body of the wife," means the heirs of their two bodies, because the word "heirs" is not applied to the one more than the other: Co. Litt. 26 a, n. (3).

Gift to A. and his wife and the heirs of the body of A.; in this case A. has an estate in tail general, and the wife an estate for life: Litt. s. 26.

Gift to A. and his wife and the heirs of A., which he shall beget on the body of his wife; here A. has an estate in special tail, and the wife an estate for life: Litt. s. 27.

Gift to A. and his wife and the heirs of the body of the wife by A. begotten; here the wife has an estate in special tail, and A. an estate for life only: Litt. s. 28; *Repps* v. *Bonham* (1608), Yelv. 131; 1 Brownl. & G. 211; S. C. *sub nom. Reps* v. *Babham*, Lane, 17; *Denn* d. *Trickett* v. *Gillot* (1788), 2 T. R. 431.

Gift to the husband and wife and the heirs "which the husband shall beget on the body of the wife," or, "of the body of the husband and wife;" here they both take an estate tail: Litt.

s. 28; Co. Litt. 26 a, n. (3); *Repps* v. *Bonham* (1608), Yelv. 131; 1 Brownl. & G. 211; S. C. *sub nom. Reps* v. *Babham*, Lane, 17; *Denn* d. *Trickett* v. *Gillot* (1788), 2 T. R. 431; *Williams* v. *Williams* (1810), 12 East, 209.

The same principles are applicable to ascertain in whom the estate tail vests, when such estate is preceded by estates for life limited to the husband and wife in succession: *Alpass* v. *Watkins* (1800), 8 T. R 516; *Williams* v. *Williams* (1810), 12 East, 209.

Begotten includes to be begotten.

If the words used are "heirs of his body begotten," the word "begotten" extends to issue afterwards begotten, and "to be begotten," to issue already begotten: Co. Litt. 20 b, and notes (3) and (A). So does "hereafter to be begotten:" *Hebblethwaite* v. *Cartwright* (1734), Ca. t. Talbot, 31. See per Wood, V.-C., *Gabb* v. *Prendergast* (1855), 1 K. & J. 439 at p. 442.

"*In posterum procreandis.*"

But where A. made a feoffment to the use of his younger son in tail, with remainder to the use of the heirs of A.'s body "*in posterum procreandis*," it was held that a special tail was created excluding issue already born: *Anon.* (1584), 3 Leon. 87. And it is pointed out, by Lord Ellenborough, C.J., in *Doe* d. *James* v. *Hallett* (1813), 1 M. & S. 124 at p. 136, that the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude him altogether.

"Male" supplied by context.

A limitation in tail general may be cut down to one in tail male, the word "male" being supplied by the context.

Settlement on C. for life, remainder to his heirs on the body of his wife to be begotten, "the male to be preferred before the female and the elder brother before the younger." *Held*, that C. took an estate in tail male: *Denn* d. *Creswick* v. *Hobson* (1770), 2 Wm. Bl. Rep. 695; 5 Burr. 2609.

To A. and B. and heirs of their bodies.

The construction of a limitation to "A. and B., and the heirs of their bodies," depends upon whether (1) A. and B. are persons unable to marry, or (2) are husband and wife, or persons able to marry.

Where A. and B. unable to marry.

(1) If A. and B. are persons unable to marry (either two men or two women, or a man and woman within the prohibited degrees), they are joint tenants for life, with several inheritances: Litt. s. 283, 284; Co. Litt. 182 a, 184 a; 1 Fearne, C. R. 36; *Smye* v. *Chown* (1589), 1 And. 264; S. C. *sub nom. Smy* v. *June*, Cro. Eliz. 219; *sub nom. Cotton's Case*, 1 Leon. 211; *sub nom. Anon.*, Sav. 127; *Matthews* v. *Temple* (1698), Comb. 467; S. C. *sub nom. Sussex* v. *Temple*, 1 Ld. Raym. 310.

(2) If A. and B. are husband and wife, or a man or woman who

can marry, they take an estate in special tail in the entirety: Y. B. 12 Hen. IV. (1410), 1, pl. 3; Co. Litt. 25 b; 1 Fearne, C. R. 35: *Symond's Case* (1567), Moore, 92; S. C. *sub nom. Anon.*, 4 Leon. 198, ca. ccexvii. is *contrà*, but cannot be relied on.

Where A. and B. husband and wife, or can marry.

So if the limitation be to husband and wife for their lives and the life of the survivor, remainder to the heirs of their bodies, they take an estate in special tail in the entirety: Bro. Abr. Estates, 75.

An estate tail may be created by words of reference.

Estate tail by reference.

If the heirs of the body of A. are mentioned and then follows a limitation to A. and his heirs aforesaid, this is tail: Y. B. 42 Edw. III. (1368), 5.

If a man gives lands to A. "*et heredibus de corpore suo*," the remainder to B. (Co. Litt. 20 b), or "to B. and his heirs" (Shep. Touch. 104), "*in forma praedicta*," this is a good estate tail. See also *Gilmore* v. *Harris* (1685–93), 3 Lev. 213; Carth. 292; Skin. 324; *Goodright* d. *Burton* v. *Rigby* (1792), 2 H. Bl. 46.

In construing the limitations in a settlement, the words "heirs," or "heirs of the body," may, by the use of a parenthesis, or by punctuation, be construed as applying to all the children, or to all the sons, as the case may require.

In settlements "heirs" extended to all the children by parenthesis, punctuation, &c.

Where the limitations in a marriage settlement were (after prior limitations) "to the use of all and every the child or children equally, share and share alike, to hold the same as tenants in common and not as joint tenants, and if but one child, then to such only child, his or her heirs or assigns for ever," it was held that the words "to hold the . . . then to such only child" might be put into a parenthesis so as to make the limitation run "to the use of all and every the child and children equally, share and share alike, his or her heirs or assigns," and thus to give estates in fee simple to the children: *Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39.

Limitations to the use of N. for life, remainder to trustees to preserve, &c. remainder (subject to a term) to the use of the first son of the body of N., lawfully issuing, and for default of such issue, to the use of the second, third, fourth, &c., and of all and every son and sons of N. lawfully issuing severally and successively in remainder one after another, as they and every of them shall happen to be in priority of birth and seniority of age, and of the several heirs male of the body and bodies of all and every such son

and sons respectively issuing. *Held*, that the only son of N. took an estate in tail male: *Owen* v. *Smyth* (1796), 2 H. Bl. 594.

Marriage settlement to the use of J. for life, remainder to trustees to preserve, &c., remainder (subject to terms for portions, &c.) to the use of the first son of the body of J. by A. his intended wife, and for default of such issue, to the use of the second, third, and other sons of the body of J. by A., severally and successively as they should be in seniority of age, and of the several heirs male of their respective bodies, and for default of such issue, then, in case A. should be *enceinte* by J., to the use of P. till A. should be delivered, in trust for such afterborn child or children; and in case such should be a son or sons, to the use of such afterborn son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such afterborn son and sons. *Held*, that the first son of J. by A., born during his life, took an estate tail: *Galley* v. *Barrington* (1824), 2 Bing. 387; 10 J. B. Moore, 21.

A limitation "to the use of M. and such other daughter or daughters as F. shall or may have or beget on the body of K., his wife, if any, share and share alike, and if no other daughter save the said M., then the said premises to go and descend to the said M., her heirs and assigns for ever." It was observed by Sugden, C. that "in construing such limitations, by punctuation, or by the use of a parenthesis, the words 'heirs and assigns,' may be extended in their application, and instead of being confined to one daughter may be referred to all the daughters of the marriage, if more than one:" *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 15. See also *Re Denny's Estate* (1874), Ir. R. 8 Eq. 427.

Owner in fee simple or tail cannot be restrained from alienation.

A limitation in fee simple or fee tail cannot be made to cease by defeasance, condition or executory gift over on the owner exercising any act of dominion thereover; any defeasance, condition or executory gift over purporting to defeat or give over the estate on the exercise of any such act is void for repugnancy: Litt. s. 360; Co. Litt. 223 a *et seq.*; *Corbet* v. *Corbet* (1888), 14 P. D. 7, where the rule was applied to an equitable fee simple and personalty held in trust.

Except separate use of married woman.

The rule does not apply to limitations for life, and a married woman can be restrained from alienating property limited to her for her separate use; Chapter on Estates for Life.

The only exception to this rule for which there is any authority is that a condition not to alienate to a given person, or class of persons, or in mortmain is valid: Litt. s. 361; Co. Litt. 223 a; Shep. Touch. 129. Sir George Jessel seems to have been prepared to extend the exception to any restrictions on the right of alienation so long as they did not prohibit alienation altogether: see *Re Macleay* (1875), L. R. 20 Eq. 186; but it is submitted that his *dicta* in that case, which was not argued, cannot be supported: see per Pearson, J., *Re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801. All the cases arise on wills and are collected in Theobald on Wills (6th ed.), p. 606.

Condition not to alienate to a class or in mortmain.

The rule does not apply to alienation of reversionary interests before they fall into possession.

Reversionary interests.

In *Barnett* v. *Blake* (1862), 2 Dr. & Sm. 117, land was granted to trustees upon certain trusts during certain lives, and then to convey unto certain children with a declaration that if any child previous to the conveyance of his share should have alienated it, such share should go over to the others. This clause was held to divest a share which one of the children had purported to alienate, and no one suggested the provision was invalid. In *Corbet* v. *Corbet* (1888), 14 P. D. 7, the document in which case was a deed proved as a will, are *dicta* to the effect that alienation of reversionary interests can be restricted.

A limitation to the heirs of a deceased person confers a fee simple on the person who happens to be his heir.

Limitation to heirs or heir of deceased person.

The authorities are: Y. B. 11 Hen. IV. (1410), 74, pl. 14; cited Williams on Real Property, pt. 2, c. 2 (19th ed.), p. 346, n. E.; *Marshall* v. *Peascod* (1861), 2 J. & H. 73. Such fee simple, if limited by deed since 1833, descends as if the deceased person had been the purchaser (3 & 4 Will. IV. (1833), c. 106, s. 4). As to what was the exact nature of the estate prior to that Act, see the discussion in Challis, R. P. (2nd. ed.), pp. 241 *et seq.*

The rule applies where the word is "heir" in the singular: Y. B. 12 Edw. IV. (1472), 2, pl. 7; *Marshall* v. *Peascod* (1861), 2 J. & H. 73 at p. 75.

"Heir" is sufficient.

If the heirs are co-parceners they take as joint tenants: *Berens* v. *Fellowes* (1887), 35 W. R. 356; *In re Baker, Pursey* v. *Holloway* (1898), 79 L. T. 343; *Owen* v. *Gibbons*, [1902] 1 Ch. 636; the two latter are cases on wills.

Co-parceners.

If the grantor is himself the heir of the deceased person, such a limitation, if contained in a deed prior to 1834, is void and the

Where grantor is the heir.

grantor, or if he took by descent the person whose heir he was, and not the deceased person, is the root of descent: *Cholmondeley* v. *Clinton* (1819–21), 2 B. & Ald. 625; 4 Bli. 1; *Moore* v. *Simkin* (1885), 31 Ch. D. 95; but if contained in a deed since 1833, vests a new estate in the grantor as purchaser: 3 & 4 Will. IV. (1833), c. 106, s. 3.

Heirs of E. and J.

A limitation to "the heirs of E. deceased and J., their heirs and assigns, as tenants in common" vests one moiety of the estate in the heir of E. and the other moiety in J. (not in his heir): *Hawes* v. *Hawes* (1880), 14 Ch. D. 614.

"Heirs" as purchasers means the heir-at-law.

The heir at common law will take under a limitation to the "heirs" or "heir" as purchasers.

"If a lease for life [of lands of the nature of gavelkind] be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent:" Co. Litt. 10 a. Mr. Hargrave in his note on this passage says: "The reason seems to be that though the subject of the gift is *customary* land, the heir at *common law* is presumed to be meant, unless words are added to describe the *customary* heir. But if such special words are used, the presumption fails; and then it is said that though the subject of the gift is common law land, yet the customary heir shall be preferred." The following are cases on wills: *Roberts* v. *Dixwell* (1738), 1 Atk. 607; *Thorp* v. *Owen* (1854), 2 Sm. & Giff. 90; *Sladen* v. *Sladen* (1862), 2 J. & H. 369; *Garland* v. *Beverley* (1878), 9 Ch. D. 213 (where the land was gavelkind); *Haslewood* v. *Green* (1860), 28 Beav. 1 (where there was a mixed gift of realty and personalty); *Polley* v. *Polley* (1862), 31 Beav. 363 (where the land was borough English).

In limitation to "heirs" as purchasers, qualification of heirs is allowed.

Under a limitation to the "heirs" of any person, with a superadded qualification, such as "male," as purchasers, the heir taking by purchase must possess that qualification.

This rule does not apply where the words are "heirs of the body." See *infra*, p. 321.

This is discussed in *Cholmondeley* v. *Clinton* (1817–21), 2 Mer. 171 at p. 344; 2 Jac. & W. 1 at pp. 77 and 106 *et seq.*; *Counden* v. *Clerke* (1612), Hob. 29; Moore, 860; *Doe* d. *Winter* v. *Perratt* (1833), 10 Bing. 198; *Wrightson* v. *Macaulay* (1845), 14 M. & W. 214; *Thorpe* v. *Thorpe* (1862), 1 H. & C. 326 (all cases on wills).

See also Mr. Hargrave's note (3), Co. Litt. 24 b; 2 Jarman on Wills, c. 28, s. 2 (5th ed. p. 910).

Immediate limitation to heirs of a living person.

An immediate limitation to the heirs of a living person, whether the grantor or not, seems to be merely void: *Davis* v. *Speed* (1692), Holt, 730; Skin. 351; 4 Mod. 153; 12 Mod. 38; 2 Salk. 675; Carth. 262; affirmed on appeal in Dom. Proc. (1698), Show. P. C. 104.

Remainder to heirs of a living person.

A limitation in remainder to the heirs of a living person, who is not the grantor, and who takes no prior estate of freehold, confers a contingent remainder in fee simple on the person who is his heir-at-law at his death. See Co. Litt. 378 a; Wms. Real P. pt. 2, c. 2; *Tipping* v. *Piggot* (1713), 1 Eq. Ca. Ab. 384, pl. 2; Gilb. Eq. 34; S. C. *sub nom. Sir Thomas Tipping's Case*, cited 1 P. W. 359. Such estate, if limited by deed since 1833, descends as if the living person had been the purchaser: 3 & 4 Will. IV. (1833), c. 106, s. 4.

"If a lease for years be made to A. the remainder to B. in tail, the remainder to the right heirs of A., there the remainder vesteth not in A., but the right heirs shall take by purchase if A. die during the estate tail:" Co. Litt. 319 b. See *Tapner* d. *Peckham* v. *Merlott* (1739), Willes 177; and see Jenk. 248, ca. xxxviii.

Remainder to heirs of grantor.

A limitation, either at Common Law or under the Statute of Uses, in remainder to the heirs of the grantor, contained in a deed prior to 1834, left the reversion in fee simple in the grantor, even if no prior estate of freehold was given to him by the conveyance: see 1 Fearne, C. R. 51; Burton, s. 335; but if made by a deed after 1833, such a limitation vests a new estate in the grantor as purchaser: 3 & 4 Will. IV. (1833), c. 106, s. 3.

"If a man seised of lands in fee make a feoffment in fee, and depart with his whole estate, and limit the use to his daughter for life, and after her decease to the use of his son in tail, and after to the use of the right heirs of the feoffor; in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himself, yet hath he a reversion:" Co. Litt. 22 b. See, to the same effect, *Fenwick* v. *Mitforth* (1594), Moore, 284; S. C. *sub nom. Milford* v. *Fenwike*, 1 Anders. 288; *sub nom. Fennick and Mitford's Case*, 1 Leon. 182; *sub nom. Read* v. *Erington*, Cro. Eliz. 321. See also *Bingham's Case* (1600), 2 Rep. 82 b; *Godbold* v.

Freestone (1694), 3 Lev. 406; *Abbot* v. *Burton* (1708), Salk. 590; 11 Mod. 181; Com. Rep. 160; and see Jenk. 248, ca. xxxviii. and 267, ca. lxxvii. Lord Coke (*loc. cit.*) goes on to explain that the grantor takes an implied use during his life, so that the heirs could not be purchasers; but the rule was the same where the limitations were such that no estate for life could be implied in the grantor.

F. made a feoffment in fee to the use of himself for years, remainder to the use of J., then his second son, and the heirs male of his body, remainder to the use of the right heirs of F. *Held*, that the limitation of the use of the heirs of the feoffor was the old use, and was executed in the feoffor as the reversion in fee, and not as a remainder: *Bedford* v. *Russell* (1593), Pop. 3; Moore, 718; 2 Anders. 197; cited 1 Rep. 130 a; *Godbold* v. *Freestone* (1694), 3 Lev. 406.

Copyholds.

It used to be thought that the rule did not apply to the surrender of a copyhold, so that where A. surrendered to the use of B. for life with remainder to the right heirs of A., the heirs of A. took by purchase: *Allen* v. *Palmer's Case* (1587), 1 Leon. 101; but this view appears to be incorrect, see 1 Fearne, C. R. 67 *et seq.*; *Roe* d. *Noden* v. *Griffits* (1766), 4 Burr. 1952; *Thrustout* d. *Gower* v. *Cunningham* (1775), 2 Wm. Bl. Rep. 1046.

Executory trusts.

But where there is a direction to convey in certain events to the heirs of the grantor, the person who on the happening of those events is his heir takes as purchaser: *Locke* v. *Southwood* (1831), 1 My. & Cr. 411; affirmed on appeal in Dom. Proc. *sub nom. Bush* v. *Locke* (1835), 3 Cl. & F. 721; 9 Bli. N. S. 1. See *Davis* v. *Kirk* (1856), 2 K. & J. 391.

Limitation to heirs of body of deceased person.

A limitation to "the heirs of the body" of a deceased person confers an estate tail on the person who happens to be heir of the body of the deceased person; such estate tail, whether limited by deed before 1834, or since 1833, descends as if the deceased person had been the purchaser: 3 & 4 Will. IV. (1833) c. 106, s. 4.

In *Mandeville's Case*, Y. B. 2 Edw. III. (1328), pl. 1 and 2; Co. Litt. 26 b; Fitzh. Abr., Taile, pl. 7 and 23, John de Mandeville, by his wife Roberge, had issue Robert and Maude and died. Michael de Morevill gave land to Roberge and to the heirs of John Mandeville, her late husband, on her body begotten. It was held that Roberge took an estate for life only, that the limitation to the heirs of the

body of John de Mandeville operated as words of purchase, that the fee tail vested in Robert by purchase, and that on his death without issue it vested in Maude by descent. See 1 Fearne, C. R. 82, note.

In *Vernon* v. *Wright* (1858), 7 H. L. C. 35, the rule was applied to a devise to "the right heirs of my grandfather S., deceased, by M., his second wife, for ever." It was held that the words "heirs by his second wife," must be construed as "heirs of the body of S. lawfully begotten on the body of M., his second wife," and that the words "for ever," did not enlarge the estate into a fee simple.

"Heirs male of the body" as purchasers.

Under a limitation to the "heirs of the body" of any person with a superadded qualification, such as male (or female), as purchasers, the person taking need not be heir general of the body.

Considerable discussion has taken place on the question whether a person, taking by purchase under the description of heir male or heir female of the body, must be heir general of the body. Coke says (Co. Litt. 24 b): "If A. hath issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of A.; A. dieth, the heir female can take nothing because she is not heir." In other words, in Coke's opinion, it was necessary that the heir male (or female) should be a male (or female) being also heir general. The modern doctrine is that by heir male (or female) of the body is meant the person who would have been heir in tail, if an estate in tail male (or in tail female) had been given to the ancestor. See Hawkins on Wills, 169; 3 Dav. Prec. 344 and 345, note; Mr. Hargrave's note (3) Co. Litt. 24 b; 2 Jarman on Wills, c. 28, s. 2, p. 911.

The distinction may be exemplified as follows: Let the gift be to the heir female of the body of A. who has a son and a daughter, both of whom die in his lifetime, the daughter having a son and the son having a daughter; then, according to Coke's doctrine, the daughter of the son would be the heir female, because she would be heir general and also a female; while according to the modern doctrine, there would be no heir female. As another example, let the daughter leave a daughter and the son leave a son; then, according to Coke, there would be no heir female, for the son's son is heir general, but is not a female. But according to the modern doctrine, the daughter's daughter would be heir female, because she would be heir if only females could inherit; or, to use other words,

she would have been heir in tail if an estate in tail female had been given to the ancestor.

Where in a settlement there was a limitation in remainder "to the use of the heirs male of the body of A.," and A. died, leaving his granddaughter his heir-at-law, and two sons, W., the elder, and H., it was held that on W.'s death without issue, H. took as heir male of the body of A.: *Wills* v. *Palmer* (1770), 5 Burr. 2615; 2 Wm. Bl. Rep. 687; 1 Fearne, C. R. 45.

Settlement of land to the use (subject to prior limitations) of the sons of the intended marriage successively in tail male, "and for want of such issue, to the use of the heirs female of the body" of the intended husband begotten on the body of the intended wife and her or their heirs, remainder to the right heirs of the husband. *Held*, that a daughter of the marriage was to be preferred to the granddaughter of the son of the marriage who was the testator's heir-at-law: *Goodtitle* d. *Weston* v. *Burtenshaw* (1772), 1 Fearne, C. R. App. 570.

Limitation to the heir (in the singular) female of the body of the settlor; there being one son, heir-at-law, and four daughters. *Held*, that the daughters took as joint tenants for life: *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193.

Immediate limitation to heirs of body of living person.

An immediate limitation to the heirs of the body of a living person seems to be merely void.

Remainder to heirs of body of living person.

A limitation in remainder, under the Statute of Uses "to the use of the heirs of the body" of a living person, whether the grantor or not, or at Common Law "to the heirs of the body" of a living person, who is not the grantor, who takes no prior estate of freehold, confers a contingent remainder in tail on the person who at the death of such first mentioned person is the heir of his body, descendible as if such first mentioned person had been the first taker, whether limited by deed before 1834, or since 1833: 3 & 4 Will. IV. (1833), c. 106, s. 4.

A limitation to "A. and the heirs of the body of his father," where the father is dead, and A. is his eldest son, gives A. an estate tail: Co. Litt. 26 b; Shep. Touch. 104. If the father is alive, it is an estate for life in A., with a contingent remainder to the heir of the body of the father. The distinction between the above limitation

and one "to A. and *his* heirs of the body of his father:" *ante*, p. 306, should be noticed.

"It seems that if land be given to the younger son, and to the heirs of the body of the father begotten, the father being dead at the time, that now the eldest shall take as joint purchaser by 3 Edw. III. (1329), 28, where land is given to J. S. and to his eldest son:" Vaillant's note to *Anon.* (1566), Dyer, 247 b, pl. 76.

Limitation by marriage settlement to use of A. (the settlor) and his heirs till the marriage, afterwards to the use of the wife for life, remainder to the use of trustees and their heirs during the life of A., remainder to the use of the sons of the marriage successively in tail, remainder to the use of the heirs of the body of A., remainder to A. in fee. *Held*, that the limitation to the heirs of the body of A. was a contingent remainder to the heir of his body: *Tippin* or *Tipping* v. *Cosin*, *Cosins*, *Cozens*, or *Coson* (1694), Carth. 272; Holt, 731; 1 Ld. Raym. 33; Comb. 312; 4 Mod. 380; 1 Fearne, C. R. 43. See, to the same effect, *Else* v. *Osborn* (1717), 1 P. Wms. 387; 2 Eq. Ca. Ab. 702, pl. 3; S. C. differently reported *sub nom. Elie* v. *Osborne*, 2 Vern. 755; *sub nom. Elice* v. *Osborne*, 1 Eq. Ca. Ab. 385, pl. 3.

Limitation to A., remainder to heirs of the bodies of A. and B.

Where A. and B. are husband and wife, a limitation to A. for life, with remainder to the heirs of the bodies of A. and B., creates not an estate tail in A., but a contingent remainder in tail in the heirs of the bodies of both A. and B. See *Anon.* (1554), Dyer, 99 a, pl. 64; *Gossage* v. *Tayler* (1652), Styl. 325, cited by Buller, J., from a MS. note, 2 T. R. 435; *Frogmorton* or *Throgmorton* d. *Robinson* v. *Wharrey* (1770), 2 Wm. Bl. Rep. 728; 3 Wils. 125, 144; see also *Lane* v. *Pannell* (1615), 1 Roll. Rep. 238, 317, 438. *Anon.* (1557), 3 Leon. 4, pl. 10, must be considered as overruled; see 1 Fearne, C. R. 38.

Remainder to heirs of body of grantor.

A limitation in remainder to the heirs of the body of the grantor at Common Law is void.

"For the donor cannot make his own right heire a purchaser of an estate tail without departing of the whole fee simple out of him:" *Greswold's Case* (1556), Dyer, 156, pl. 24; Co. Litt. 22 b; 1 Fearne, C. R. 51; 1 Sand. Uses, 136.

The above rules as to limitations, whether in fee simple or in tail, to the heirs of living persons only apply where such living persons take no estate of freehold under limitations contained in the same deed, for—

Rule in *Shelley's Case.*

Where the ancestor takes an estate of freehold, whether by limitation or resulting use, and in the same

instrument an estate is limited by way of remainder, either mediately or immediately, to his "heirs" or "heirs of the body," the word "heirs" is a word of limitation and not of purchase, and therefore the ancestor takes an estate in fee simple or in tail, as the case may be.

This is always called the rule in *Shelley's Case*, but the rule did not originate in that case—it is as old as a case in Y. B. 18 Edw. II. (1322) fo. 577, translated in a note to *Harrison* v. *Harrison* (1844), 7 Man. & Gr. 938 at pp. 941 *et seq.* The rule is also discussed in *Shelley's Case* (1581), 1 Rep. 93 b; 1 Fearne, C. R. 28 *et seq.*; Challis, R. P. (2nd ed.), 141 *et seq;* Mr. Thomas' note I. 5 to *Shelley's Case*, in 1 Coke's Reports by Fraser, pp. 262 *et seq.;* Lord Macnaghten's speech in *Van Grutten* v. *Foxwell*, [1897] A. C. 658 at pp. 667 *et seq.;* and in Goodeve's R. P. (3rd ed.), p. 239.

"Here it appeareth that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heirs, that the fee simple vesteth in himself, as well as if it had been limited to him and his heirs; for 'his right heirs' are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for years: as if a lease for years be made to A. the remainder to B. in tail, the remainder to the right heirs of A., there the remainder vesteth not in A., but the right heirs shall take by purchase if A. dies during the estate tail . . . And so it is if A. makes a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B. B. hath the fee simple in him as well when it is by limitation of use, as when it is by act executed:" Co. Litt. 319 b.

Estate of ancestor determinable.

It makes no difference that the estate of the ancestor may determine during his own lifetime, as in *Merrill* v. *Rumsey* (1665), 1 Keb. 888; 1 Sidf. 247, pl. 12; T. Raym. 126, where a conveyance was made to husband and wife for their joint lives, and after the decease of either, to her heirs by him begotten, and it was held to be tail in the wife; or, as in *Curtis* v. *Price* (1805), 12 Ves. 89, where the estate limited to the ancestor was during widowhood only.

Vested and contingent remainders interposed.

The fee simple, or fee tail, which the ancestor takes under the rule in *Shelley's Case*, is of course subject to all the other limitations contained in the deed, so far as such limitations are valid; and even under the old law, contingent remainders interposed between the limitation to the ancestor and that to his heirs were not destroyed. The estate of inheritance in the ancestor was

considered to be executed *sub modo* only, and so as to open and let in the contingent estates if they vested in the lifetime of the ancestor: *Lewis Bowles's Case* (1615), 11 Rep. 79 b; Tud. L. C. Real P. p. 86 (4th ed.).

Ancestor taking estate by resulting use.

An estate of freehold in the ancestor by resulting use (or, as it is often incorrectly termed, implication) only is sufficient: *Pibus, Pybus,* or *Bipus* v. *Mitford* or *Milford* (1674), 1 Vent. 372; 1 Mod. 98, 121 and 159; 3 Keb. 129, 239, 316 and 338; 2 Lev. 75; Sir T. Raym. 228; 1 Freem. 351 and 369; *Wills* v. *Palmers* (1770), 5 Burr. 2615; 2 Wm. Bl. Rep. 687, in which case there is great difficulty in understanding that part of the certificate which says "that if a third person had been the grantor, Henry would have taken an estate in tail male by purchase." William was at Archdale's death the heir male of his body, so that he would have taken an estate in tail male by purchase, and Henry would have taken by descent from him according to the doctrine in *Mandeville's Case, supra,* p. 320. Possibly all that was meant was that Henry would not have taken by descent from Archdale. See 1 Fearne, C. R. 82. The case is discussed, 1 Fearne, C. R. 45; see also *Southcote, Southcott,* or *Southcot* v. *Stowell* (1677), 1 Mod. 226, 237; 2 Mod. 207; 1 Freem. 216, 225; 3 Keb. 704.

Copyholds.

The rule applies to limitations of copyholds: *Allen and Palmer's Case* (1587), 1 Leon. 101; see 1 Fearne, C. R. 66 *et seq.*; and to limitations of gavelkind lands: *Doe* d. *Bosnall* v. *Harvey* (1825), 4 B. & C. 610.

Both limitations must be in same instrument.

> The two limitations must be in the same instrument: a deed executing a power is for this purpose the same instrument as the deed creating it.

See per Dyer, C.J., in *Cranmer's Case* (1573), 2 Leon. 5 at p. 7; *Snowe* v. *Cuttler* (1664), 1 Lev. 135; *Moor* v. *Parker* (1694), 4 Mod. 316; 1 Ld. Raym. 37; Skin. 558; 1 Eq. Ca. Ab. 182, pl. 22; *Doe* d. *Fonnereau* v. *Fonnereau* (1780), 2 Doug. 487.

Deeds exercising powers.

The question whether a deed in execution of a power is to be considered as part of the instrument conferring the power, so as to make limitations in the two instruments coalesce according to the rule, has been much discussed: see Co. Litt. 299 b, n. (1); 1 Fearne, C. R. 74; 1 Prest. Est. 309; 2 Jarman on Wills, c. 36 (1), p. 1180 (5th ed.). In Sugden on Powers (8th ed.) p. 472, Lord St. Leonards says: "In *Venables* v. *Morris* (1797), 7 T. R. 342, the very question arose. Under a settlement, the husband was tenant for life, remainder to trustees and their heirs generally to preserve

remainders, with remainder (after several uses which never arose) to such uses as the wife should appoint. She appointed to the right heirs of her husband. The Court ultimately held that the fee simple vested in the trustees, so that the estate limited under the power being merely equitable, could not unite with the limitation to the husband for life in the deed, which was a legal estate; but Lord Kenyon treated it as quite a clear point, that the appointment was to be considered in the same light as if it had been inserted in the original deed by which the power of appointment was created; and therefore he held that, if the limitation to the heirs of the husband had been a legal estate, it would have enlarged the estate in the ancestor, and given him a fee. The point may be considered as settled."

Rule applies to equitable limitations.

The rule in *Shelley's Case* applies to equitable limitations, but the limitations must be both legal or both equitable.

One limitation legal and one equitable.

The rule does not apply where one limitation is legal and the other is equitable: *Tippin* or *Tipping* v. *Coson, Cosin, Cosins* or *Cozens* (1694), 4 Mod. 380; Carth. 272; Holt, 731; 1 Ld. Raym. 33; Comb. 312; *Lord Say and Seal* v. *Lady Catherine Jones* (1729), 3 Bro. P. C. 113; *Venables* v. *Morris* (1797), 7 T. R. 342; *Ireson* v. *Pearman* (1825), 3 B. & C. 799; nor *semble* where one limitation is in form legal and the other in form equitable, but both are really equitable by reason of the legal estate being outstanding: *Coape* v. *Arnold* (1855), 4 D. M. & G. 574 at p. 587. *Re White and Hindle's Contract*, (1877) 7 Ch. D. 201, which is *contrà*, is probably wrong.

Words added to limitation to ancestor.

The rule applies even if words are added to the limitation to the ancestor, clearly showing that his estate is not intended to continue after his death: Tud. L. C. R. P. (4th ed.), p. 347; the cases (all on wills) are collected in Theobald on Wills, c. 34, iv. A. 1 (6th ed.), p. 406.

Limitation to heirs followed by words of distribution;

The rule applies if words of distribution, as "share and share alike," are added to the limitation to the heirs: Tud. L. C. R. P. (4th ed.), p. 349; Hawkins on Wills 184; the cases (all on wills) are collected in Theobald on Wills, c. 34, iv. A. 3 (6th ed.). p. 407.

or by words of limitation;

The rule applies if words of limitation, as "and their heirs," are added to the limitation to the heirs: see this discussed, Hawkins on Wills, 185.

Where in a marriage settlement the limitations were to the husband for life, remainder to the wife for life, remainder to the "heirs of the body of the wife and their heirs and assigns for ever,"

it was held that the wife took an estate tail: *Alpass* v. *Watkins* (1800), 8 T. R. 516.

The cases on wills are collected in Theobald on Wills, c. 34, iv. A. 2 (6th ed.), p. 406; Tud. L. C. R. P. (4th ed.), p. 348.

or by words of both distribution and limitation.

The rule applies if words both of distribution and of limitation are added to the limitation to the heirs: Tud. L. C. R. P. (4th ed.), p. 351; Theobald on Wills, c. 34, iv. A. 4 (6th ed.), p. 408. The question what words of explanation added to the word "heirs" will render the heirs purchasers is discussed in Hawkins on Wills, 186; Theobald on Wills, c. 34, iv. A. (6th ed.), p. 408.

Deeds and wills.

In *Re White and Hindle's Contract* (1877), 7 Ch. D. 201, Malins, V.-C., held that there is no difference between deeds and wills as to the application of the rule in *Shelley's Case*.

Remainder contingent.

The rule applies though the remainder be contingent: Co. Litt. 378 b; 1 Prest. Est. 316.

Executory or conditional limitation to the heirs.

The rule does not apply where the limitation to the heirs is not by way of remainder, but is by way of executory or conditional limitation of a future use: 1 Fearne, C. R. 276; 1 Prest. Est. 323; *Richardson* v. *Harrison* (1885), 16 Q. B. D. 85. There is a *dictum* to the contrary by Malins, V.-C., in *Re White and Hindle's Contract* (1877), 7 Ch. D. 201, but see the criticisms on that case in Challis, R. P. (2nd ed.), p. 154.

Executory instruments.

The rule does not apply to executory instruments: *White* v. *Thornburgh* (1715), 2 Vern. 702; Prec. in Chan. 425; Gilb. Eq. Rep. 107; 2 Eq. Ca. Ab. 714, pl. 2; *Trevor* v. *Trevor* (1720), 1 P. Wms. 622; 1 Eq. Ca. Ab. 387, p. 7; 2 Eq. Ca. Ab. 505, pl. 1; 5 Bro. P. C. 122; *Papillon* v. *Voice* (1728), 2 P. Wms. 471; W. Kel. 27.

"Heirs of the body," meaning children.

The context may show that the words "heirs of the body" mean "children," and then they will be words of purchase, notwithstanding that the parent takes a prior estate of freehold.

Limitations to E. for life, remainder to the first son of E. in tail male, with like remainders to the second, third, and fourth sons in tail male, "and so severally and respectively to each of the heirs male of the body of E., and the heirs males of their bodies," remainder over. *Held*, that E. took an estate for life only, with remainder to his sons successively in tail male: *Lisle* v. *Gray* (1679), T. Raym. 278, 302, 315; T. Jones, 114; 2 Lev. 223. It is stated by Tracey, J., who had searched the record (1 P. Wms. 90), by Lord Hardwicke (1 Ves. Sen. 147), and by Lord Mansfield (2 Burr. 1109), that the statement that *Lisle* v. *Gray* had been reversed is erroneous.

By a marriage settlement lands were limited to the use of the

husband and wife successively for life, with remainder to the use of the heirs of the body of the husband on the body of the wife and their heirs, and if more children than one, equally to be divided between them as tenants in common, and for default of such issue, over. *Held*, that the children took by purchase as tenants in common in fee: *North* v. *Martin* (1833), 6 Sim. 266.

On marriage the husband executed a deed poll whereby he settled all his real and personal estate "upon the said (intended wife) in case she survive me, and upon the heirs of her body by me lawfully to be begotten, obliging her to pay to each of her children by me begotten as aforesaid, so soon as he, she, or they attain the age of twenty-one years, the sum of 1,000*l.*, and the remainder of all I die possessed of equally at her death to divide among her children by me begotten as aforesaid." *Held*, that the children took as tenants in common in fee: *Lowther* v. *The Earl of Westmoreland* (1784), 1 Cox, 64. (But this seems to have been considered as a case of executory limitation, see p. 67.)

Trusts of freeholds and leaseholds declared for H. for life, and afterwards for the heirs of her body, and of J. and M. their heirs, &c. *Held*, that H. took for life only and that the heirs of the body were purchasers: *Withers* v. *Algood* (1735), cited *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142 at p. 150.

The rule in *Shelley's Case* does not apply where the word used is "heir" or "heir of the body" in the singular.

It follows that—

Limitation to A. for life; remainder to his heir or heir of his body.

Under a limitation to A. for life, with remainder to his "heir" or to the "heir of his body," A. takes for life only, with a contingent remainder for life to his heir, or to the heir of his body: *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193.

Remainder to heir of his body and the heirs, or heirs of the body, of such heir.

Under a limitation to A. for life, with remainder to the heir of his body, and the heirs, or heirs of the body, of such heir, A. takes for life only, with a contingent remainder in fee or tail to the heir of his body: *Archer's Case* (1597), 1 Rep. 66 b; S. C. *sub nom. Baldwin* v. *Smith*, Cro. Eliz. 453.

Limitation to A. for life, remainder to his first son and the heirs male of his body, and so to his six sons, remainder to the heir male of A. to be begotten after the sixth son and of his heirs male.

Held, that the last remainder was only a contingent estate in the son, and not tail in A.: *Waker* v. *Snowe* (1622), Palm. 359.

In a marriage settlement, after trusts for life for the husband and wife, there were trusts in remainder for the heir male of her body by him to be begotten and his heirs male, and for want of such, trusts for the daughters, and if there should be no issue of the marriage, in trust for the right heirs of the husband. The first remainder was held to be a contingent remainder in fee to such person as should be heir male of the body of the wife at her death: *Bayley* v. *Morris* (1799), 4 Ves. 788.

A limitation to A. for life, with an ultimate limitation to the use "of such person or persons as at the decease of the said A. shall be his heir or heirs-at-law and of the heirs and assigns of such person or persons" vests a life estate in A. with a contingent remainder in fee to the person or persons who at A.'s death answer the description of his heir or co-heirs: *Evans* v. *Evans*, [1892] 2 Ch. 173.

"Heir" in the singular construed "heirs."

But "heir" in the singular may be explained to mean "heirs" in the plural, so as to be a word of limitation instead of purchase.

Feoffment to the use of the grantor for life, remainder to the use of B. for life, remainder to the use of the heir or heirs of the body of the grantor, and to the use of the heir of such heir or heirs, (*ad usum haeredis vel haeredum de son corps demesne et ad usum haeredis talis haeredis vel haeredum*), and if he died without issue remainder over. *Held*, that the heir took by descent, for though "heir" is a word of purchase, yet "heirs" explains it, and makes him in by descent of an estate tail: *Bony* v. *Taylor* (1614), 2 Roll. Abr. 253, H. pl. 3; 16 Viner, 213, Parols, H. pl. 3.

Equitable limitations, and grants of equitable interests.

An equitable limitation by way of trust executed, as distinguished from an executory trust, has the same construction as a legal limitation, and a grant of an equitable interest has the same construction as a grant of a legal interest.

Preston, Estates, vol. 2, p. 64; Hayes, Conveyancing (5th ed.), vol. 1, c. 3, pp. 91 and 92; Lewin on Trusts (11th ed.), c. 8, s. 1 (2), p. 121; Williams' Real Property (19th ed.), c. 7, s. 4, p. 181. And it makes no difference whether such limitations are contained in deeds creating or deeds conveying such equitable interests. The distinction between executed trusts and executory trusts is stated, and the cases are collected, *infrà*, Chapter on Executory

Trusts. "But where the trusts and limitations are already expressly declared the Court has no authority to interfere and make them different from what they would be at law," per Lord Northington, L.K., *Austen* v. *Taylor* (1759), 1 Ed. 361 at p. 368; Ambl. 376 at p. 378 (a case on a will).

"The trust is the estate at law in this Court (of Chancery) and governed by the same rules in general as all real property is by limitation:" per Lord Mansfield, C.J., *Burgess* v. *Wheate* (1759), 1 Ed., 177 at p. 224.

By the marriage settlement of a widow having children, real estate was conveyed by her to a trustee in fee, upon trust for her separate use for life, with remainder in trust for her children as tenants in common, without any words of limitation. *Held*, that the children took estates for life only: *Holliday* v. *Overton* (1852), 14 Beav. 467; 15 Beav. 480; 16 Jur. 751.

Realty conveyed by marriage settlement to the use of trustees and their heirs upon trust for the wife and husband successively for life, and afterwards for the children, and in default as the wife should appoint, and in default for her next of kin, without any words of limitation. There were no children, and the wife made no appointment. *Held*, that the next of kin took for life only: *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274.

Post-nuptial settlement vesting freeholds, copyholds, and leaseholds in trustees in fee, upon trust to permit the settlor's wife to receive the rents during the joint lives of herself and the settlor and during her widowhood, and afterwards upon trust to convey and divide such estate and premises amongst their children and the issue of their children who should then be living as tenants in common, the issue of deceased children to take their parents' shares. *Held*, that the children living at the time of division, and the children then living of those who were dead, took life estates only: *Tatham* v. *Vernon* (1861), 29 Beav. 604.

Voluntary settlement vesting freeholds in trustees in fee, upon trust for the settlor for life, with remainder in trust for A. as and when he should attain twenty-one, with interim powers of maintenance. If A. should die under twenty-one, or having attained that age should die in the lifetime of the settlor without leaving issue living at the death of the settlor, a trust over. A. attained twenty-one, survived the settlor, and died leaving issue. *Held*, that A. took for life only: *Middleton* v. *Barker* (1873), 29 L. T. N. S. 643.

By a marriage settlement land was vested in trustees in fee simple, on certain trusts during the lives of the husband and wife,

and subject thereto "on trust for all and every the children of the marriage to be equally divided between or among them, if more than one, in equal shares as tenants in common, but if there shall be but one such child, then the whole to be in trust for that one child, the shares of such children being a son or sons to be conveyed or transferred to him or them or his or their representatives, as and when he or they shall attain his or their respective ages of twenty-one years or die under that age leaving lawful issue, and the shares of such of them as shall be a daughter or daughters to be conveyed or transferred to her or them when and as she or they shall attain the age of twenty-one years, or be sooner married." *Held*, that the children took for life only: *Meyler* v. *Meyler* (1883), 11 L. R. Ir. 522.

Voluntary settlement of an equity of redemption by way of conveyance to trustees and their heirs upon trusts for certain persons for life, and "then as to and concerning the hereditaments and the rents and profits thereof," in trust for such child or children of the settlor as being sons should attain twenty-one, or being daughters should attain twenty-one or marry, "the same to be, if only one such child, paid, assigned, or transferred unto him or her solely, or if two or more such entitled children, then to be paid, assigned, or transferred in equal shares as tenants in common," the shares being paid, assigned, or transferred at twenty-one or marriage. *Held*, that the children took life estates only: *Re Whiston's Settlement, Lovatt* v. *Williamson*, [1894] 1 Ch. 661.

"Estate and interest."

An assignment by A. of all his estate and interest in certain real estate devised by will to trustees, to a purchaser without words of limitation. *Held*, to pass a life estate only: *Dearberg* v. *Letchford* (1895), 72 L. T. 489.

"Share."

Assignment of the share to which A. was entitled under a will in the residuary estate of a testator and the investments representing the same, to trustees, habendum unto the trustees, their executors, administrators and assigns upon trusts: it having been held that under the will there was no trust for conversion and that A. was entitled to have conveyed to him a share of the testator's residuary real estate, it was held that an estate for the lives of the trustees and the life of the survivor of them only passed by the assignment: *Re Hudson* (1895), 72 L. T. 892.

Hereditaments in which the settlor had an equitable estate in fee simple were conveyed unto trustees without words of limitation. It was held that an estate for their joint lives and the life of the

survivor of them only passed by the deed: *In re Irwin, Irwin* v. *Parkes*, [1904] 2 Ch. 752.

Copyholds were settled in trust after the deaths of a woman and her husband, "for all the children of such marriage equally to be divided between them as tenants in common, and in default of issue of such marriage, then to such uses as" the woman should by will appoint, with remainder to her right heirs, it was held by Joyce, J., that the children of the marriage were entitled to equitable estates in fee simple on the ground that the settlor intended, as appeared from the deed, to make a complete settlement of his whole estate in the copyholds: *In re Tringham's Trusts, Tringham* v. *Greenhill*, [1904] 2 Ch. 487; but it is submitted that this decision, though authority for it can be found in some of the older text books, is not reconcileable with the modern decisions.

Wills.

It will be observed that this rule differs from the rule applicable to the construction of wills taking effect before the 1st January, 1838, for, if on the construction of such a will the trustees took the whole legal fee in trust for A., without any words of limitation, A. took the whole equitable fee: Hawkins on Wills, 137.

Personalty.

The expressions "heirs" and "heirs of the body," are of course inept when used with reference to personal estate, but they are often to be found in deeds relating to personalty.

When this is the case—

Gift of personalty to A. and his heirs.

A gift of personalty, either directly to, or by way of trust for, "A. and his heirs," is a gift to A. absolutely: Williams' Personal Property, pt. 3, c. 1, p. 347 (15th ed.).

Gift of personalty to heirs of A.

A gift of personalty, either directly to, or by way of trust for, the "heirs" of A., is a gift to the heir-at-law of A.

Substitutionary gift of personalty to heirs of A.

A gift of personalty, either directly to, or by way of trust for, the "heirs" of A. in substitution for A., in the event of his death before the time of distribution, is a gift to the statutory next of kin of A.

The distinction between the two last preceding rules is well explained by Romilly, M.R., in *Hamilton* v. *Mills* (1861), 29 Beav. 193, where the trusts of money were declared by deed for A. for life, afterwards for B., his wife, for life, afterwards for the children of the marriage, "and on failure of any child or children of the marriage, then to the right heirs of the survivor of A. and B."

Lord Romilly (at p. 197) said: "Nothing turns on the word '*heirs*' being in the plural instead of the singular number; they may be many as well as one. The question is, whether the words 'right heirs' are to be treated as words of description or words of substitution; it is something analogous to, but not the same as, the case of a devise of real estate, where the question is whether the word 'heirs' is a word of limitation or purchase. I cannot say it is a word of limitation; nor is it what may be called a word of substitution. If it creates a gift substituted on a failure of a prior gift, so that the real meaning of the words in the will amounts to this—that if the person who is the principal object of the legacy should die and not be able to receive it, it is given to his right heirs—it follows the devolution of personal estate. If a legacy be given to A. or his heirs, A., if he survives the testator, will be entitled to the legacy; but if A. die, the word 'heirs' is introduced to prevent a lapse, and therefore the Court holds that if the first legatee does not take, the same person will take as would have taken after him if there had been no lapse, and that the legacy follows the devolution of personal estate. But when the words are descriptive and not substitutional, you must follow the obvious meaning of the word. Thus, if a person says, 'I give a legacy to the heir male of A.,' the heir takes the legacy, and A. takes nothing. It is the same as if the testator said, 'I give the person who is A.'s heir 1,000*l.*' The only question is, to which of these two classes of cases these words belong. . . . In all cases of substitution, the primary legatee, if he had survived the testator, would have taken; but here there is no gift to the survivor, but the settlement expressly directs that on failure of children it is to go 'to the right heirs of the survivor.' There is no principle on which these words can be considered as a substitutional gift to the 'right heirs' of the survivor."

By a marriage settlement 500*l.* was assigned to trustees, on trust, with the consent of the wife, to lay out the same in land of inheritance to be conveyed to the trustees and their heirs, in trust, to pay the rents to her for life for her separate use, remainder to her husband for life, and after the death of the survivor, on trust to convey to such persons as the wife should appoint, and in default of appointment, in trust for the heirs of the wife: proviso, that, until the purchase, the trustees should invest in the Funds, and pay the dividends to the wife for her life for her separate use, and after her death, to the persons who would be entitled to the rents of the land if purchased, and should pay or transfer

the principal sum of 500*l.*, or the stock purchased, to such person "as according to the limitations aforesaid might be entitled to the inheritance" of the land. There was no issue of the marriage; the wife died and afterwards the husband died. *Held*, that on the death of the wife without having appointed, the 500*l.*, which had not been invested in land, and was not to be considered as land even in equity, the direction for investment not being imperative, went to the personal representative of the person who at the wife's death was her heir-at-law: *Russell* v. *Smythies* (1786), 1 Cox, 215.

A. and B. were co-heiresses to an estate; by post-nuptial settlement A.'s moiety was settled to the use of her husband C. for life, remainder to the use of A. for life, remainder to the use of B. for life, remainder to trustees for a term of years. The trusts of the term were to raise 1,000*l.* and to pay it (in default of exercise of a special power, which was not exercised), "to the next heir or co-heirs" of B. A. and her husband died in the lifetime of B. *Held*, that the heirs-at-law of B. were entitled on B.'s death to have the 1,000*l.*: *Morris* v. *Cantle* (1782), 6 Br. P. C. 418.

No case has been found where, under the trusts of a deed, the "heirs" took by substitution. The cases on wills are collected in *Wingfield* v. *Wingfield* (1878), 9 Ch. D. 658; see also *Keay* v. *Boulton* (1883), 25 Ch. D. 212; Theobald on Wills, c. 31, "Bequests of Personalty to Heirs," (4), p. 326 (6th ed.); Jarman on Wills, c. 28, s. 5. p. 923 (5th ed.).

Trust for A. and the heirs of his body.

A gift of personalty, either directly to, or by way of trust for, "A. and the heirs of his body," or for "A. for life," with remainder, either mediate or immediate, to the "heirs of his body," is a gift to A. absolutely.

Chattels real or personal limited to A. for life, remainder to the heirs of his body.

"Where there is an express limitation of a chattel by words which if applied to a freehold would create an express estate tail, the whole interest vests absolutely in the first taker:" per Ashurst, J., *Doe* d. *Lyde* v. *Lyde* (1787), 1 T. R. 593 at p. 596 (a case on a will); cf. 1 Fearne, C. R. 490 *et seq.*; 2 Fearne, C. R. ss. 593 *et seq.*

This rule is sometimes stated thus: "Expressions which, if applied to real estate, would confer an estate tail, when applied to personal property, simply give the absolute interest:" see *Leventhorpe* v. *Ashbie* (1635), 1 Roll. Abr. 831, pl. 1; Tud. L. C. Real P. 382, (4th ed.) (a case on a will).

Examples.

Term assigned by marriage settlement to trustees on trust to

permit T., the intended husband, to enjoy the same so long as he should live, with remainder on trust for A., the intended wife, for life, and after the decease of T. and A. to permit the heirs of the bodies of T. and A. to hold the premises during the remainder of the term. *Held*, that the whole term vested in T.: *Webb* v. *Webb* (1710), 2 Vern. 668; 1 P. Wms. 132.

To the same effect are *Tatton* v. *Mollineux* (1610), Moore, 809; *Hunt* v. *Baker* (1680), 2 Freem. 62; *Theebridge* v. *Kilburne* (1751), 2 Ves. Sen. 233. Consider *Re Whitty*, Ir. R. 9 Eq. 41. The cases on wills are collected, Hawkins, 188; Jarman on Wills, c. 44, p. 1366 (5th ed.).

The rule has also been applied where the words were to permit and suffer A. to receive the rents, &c., *for so many years of the term as should* expire in his lifetime, and after his decease in trust to permit B., A.'s wife, to receive the rents during her life, and after the several deceases of A. and B. to permit the heirs of the body of A. to receive the rents for so many years of the term as should expire in the life or lives of him, her, or them respectively: *Bartlett* v. *Green* (1842), 13 Sim. 218; 12 L. J. N. S. Ch. 148.

Gift over on failure of issue.

The rule is not affected by a gift over on general failure of issue of the propositus: *Theebridge* v. *Kilburne* (1751), 2 Ves. Sen. 233; *Bartlett* v. *Green* (1842), 13 Sim. 218; 12 L. J. N. S. Ch. 148.

"Heir" in singular.

The rule seems to apply where the word is "heir" in the singular: *Le Rousseau* v. *Rede* (1761), 2 Ed. 1, the Lord Chancellor Northington saying that the word must be construed as "heirs," see p. 6.

Exceptions.

There are exceptions to this rule:—

"Heirs of the body," their executors.

First. Where there are words of limitation to the executors of the heirs of the body, the latter take by purchase: *Hodgson* v. *Bussy* (1740), Barn. Ch. Rep. 195; 2 Atk. 89, cited as *Hodsel* v. *Bussy* in *Garth* v. *Baldwin* (1755), 2 Ves. Sen. 646, at pp. 652, 660.

Executory trusts.

Second. Where there is an executory trust for the heirs of the body: see *infra*, Chapter on Executory Trusts.

"Heirs of the body" construed by context.

Third. The context may show that "heirs of the body" are words of purchase: *Withers* v. *Algood* (1735), cited in *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142 at p. 150, where the words were "to A. for life, and afterwards to the heirs of her body, and of J. and M., their heirs, &c."

Heirs of the wife's body taking husband's property.

Fourth. Apparently where the trusts are contained in a marriage settlement, and the property is the husband's, and the heirs are to proceed from the body of the wife, the heirs take as purchasers.

Where by a marriage settlement, a term belonging to the husband was assigned to trustees on trust "to permit and suffer the husband and wife, and the survivor of them, to receive the profits for so many years of the term as they or the survivor of them should happen to live, and after their deaths to the use of the heirs of the body of the wife by the husband to be begotten." *Held*, that the "heirs of the body" took by purchase, it being considered as analogous to the case of a wife tenant in tail, *ex provisione viri* under 11 Hen. VII. (1495), c. 20; *Peacock* v. *Spooner* (1690), 2 Vern. 195; Freem. Ch. Rep. 114; and cited in *Webb* v. *Webb* (1710), 1 P. Wms. 134. This case was followed in *Dafforne* v. *Goodman* (1699), 2 Vern. 362; S. C. *sub nom. Daffern* v. *Bolt*, Prec. Ch. 96; Freem. Ch. Rep. 228, 231. These cases are discussed, Fearne, C. R. 493; Fearne's Posth. Works, 388 *et seq.* *Peacock* v. *Spooner* was a decision of lay peers in the House of Lords against the opinion of the majority of the Judges, and Fearne (1 Cont. Rem. p. 493) thinks it "is only attended to in cases exactly the same in specie with itself."

Where ancestor takes a term of years only.

Fifth. It has been held in one case that where the trust for the ancestor was for "ninety-nine years if he should so long live," the children took by purchase: *Ward* v. *Bradley* (1687), 2 Vern. 23, cited in *Webb* v. *Webb* (1710), 1 P. Wms. 132 at p. 134.

"Heirs" meaning children.

Sixth. The context may show that by "heirs" is meant children. See *suprà*, p. 327.

Trust in remainder for heirs of the body

A gift of personalty either directly to, or by way of trust for, the "heirs of the body," in remainder after the death of the ancestor, vests in such of his statutory next of kin as descend from him.

Example.

In *Ward* v. *Bradley* (1687), 2 Vern. 23, where the trusts of personalty were for A. for ninety-nine years if he lived so long, then for his wife for life, remainder for the heirs of A. begotten on his wife; it was held, that on the death of A., the children who survived him took equally. It will be observed that the decision in *Ward* v. *Bradley* does not show that a child in order to take must survive the propositus; but the reasoning in *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276 (a case on a will), seems to show that the rule as above laid down is correct.

Substitutionary gift of personalty to heirs of body.

No case has been found where under a deed the "heirs of the body" took by substitution, but probably the statutory next of kin who descended from the original taker would be held to be entitled.

CHAPTER XVII.

DEATH WITHOUT ISSUE.

Death without Issue: Limitation to A. and his Heirs, followed by a Limitation over on Death "without Issue," or, "without Heirs of his Body": Limitation over "in Default of such Issue," or "without leaving Issue": Limitation over on Death before the happening of a Certain Event, "or" without Issue: Limitation to Children with Limitation over "in Default of such Issue."

In many deeds limitations are to be found to A. for life with remainder to his issue, or to A. in fee, followed by a limitation over on A.'s death without issue, and such limitation over in many cases affects the construction of the prior limitations.

"Death without issue," means general failure of issue.

In the absence of any context the words "die without issue," or "die without issue male," are construed to mean the failure of the issue, or of the issue male, of the propositus at any time, either before, at, or after his death.

"Until he die without issue and as long as he shall have issue are terms synonymous in my opinion," per Montague, C.B., *Duke of Norfolk's Case* (1681), 3 Ch. Ca. 1 at p. 17.

Examples.

Limitation of a term to raise portions, "if A. should die without issue male;" A. died leaving a son and a daughter, then the son died without issue. *Held*, that the limitation on "the death of A., without issue male" thereupon took effect: *Goodwin* v. *Clark* (1662), 1 Lev. 35; S. C. *sub nom. Goodiar* v. *Clarke*, 1 Sidf. 102, where the words are said to be "if he die without heir male of his body;" *sub nom. Goodier* v. *Clerke*, 1 Keb. 73, 78, 169, 246, 462, where the case is stated somewhat differently: stated per Holt, C.J., in *Andrews* v. *Stroud* (1706), Holt, 623 at pp. 624, 625.

The rule does not apply where the limitaton over is on death without issue at a certain age: *Right* v. *Day* (1812), 16 East, 67 (a will case); nor to a covenant to repay on death without issue within a certain

period: *Brett* v. *Pildredge* (1637), cited in *Goodiar* v. *Clarke* (1663), Sidf. 102; and S. C. *sub nom. Bret* v. *Bridman*, cited in *Goodier* v. *Clerk* (1663), 1 Keb. 462.

Context.

The context may show that death "without issue" means "without leaving children," see *infra*, Chapter on Marriage, &c., or "without leaving issue living at A.'s death." The cases, all of which arise on wills, are collected: Hawkins, 207; Jarman on Wills, c. 41, p. 1320 (5th ed.); Theobald on Wills, c. 50, p. 679 (6th ed.).

Limitation to A. and his heirs with a limitation over on his death without issue.

A limitation "to A. and his heirs," followed by a limitation over if A. dies "without issue," or "without heirs of his body," confers an estate tail on A.: see per Wright, L.K., note to *Bamfield* v. *Popham* (1702), 1 P. Wms. 54 at p. 57.

"If lands be given to B. and his heirs, to have and to hold to B. and his heirs, if B. have heirs of his body, and if he die without heirs of his body, that it shall revert to the donor, this is adjudged an estate tail and the reversion in the donor:" Co. Litt. 21 a.

Examples.

Limitation to the use of A. and B., his wife for life and to the heirs of A. after the death of A. and B., and if it shall happen that A. shall die without issue of his body, remainder over. *Held*, tail in A.; *Canon's Case* (1558), 3 Leon. 5, pl. 13.

Feoffment by B., to the use of himself for life, remainder to the use of J. for life, remainder to the use of the first son begotten of the body of J. that shall have heirs male of his body and to his heirs for ever, and in default of such issue of his body, to the use of the first daughter and daughters of J., which shall have issue of her body, and in default of such issue remainder to the right heirs of J. *Held*, that the limitation to the first son of J. was a contingent estate tail in him: *Beck's Case, alias Burton* v. *Nichols* (1630), Litt. Rep. 159, 253, 285, 315, 344. The report of this case *sub nom. Boreton* v. *Nicholls*, Cro. Car. 363, is very imperfect.

Limitation to the use of A. for life, remainder "to the use of his son Thomas and his heirs for ever, and for default of issue of the body of the son," to the use of the heirs of A. *Held*, tail in the son: *Leigh* or *Lee* v. *Brace* (1696), 5 Mod. 266; Carth. 343; 1 Ld. Raym. 101; 3 Salk. 337; Holt, 668; 12 Mod. 101. There is some discrepancy in the reports of this case, but it is correctly stated in the text. See per Willes, C.J., in *Tapner* d. *Peckham* v. *Merlott* (1739), Willes, 177 at p. 181.

Limitation to the use of A. for life, remainder to the use of his eldest son and the heirs male of such eldest son, the elder always to be preferred before the younger, and in case of failure of the issue male of the eldest son, remainder over. *Semble*, the eldest son took an estate tail: *Smith* v. *Smith* (1855), 5 Ir. C. R. 88.

Conveyance to the use of the settlor for life, remainder to the use of D., his heirs and assigns, but if D. should die without issue, to the use of T., his heirs and assigns, but if both D. and T. should die without issue, to the use of the male issue of the settlor. D. died without issue. *Held*, that T. took an estate tail: *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99.

Estate for life not enlarged by limitation over on death without issue.

It is perhaps necessary to say that an express estate for life will not be enlarged by a gift over in default of issue of the tenant for life: *Seagood* v. *Hone* (1634), Cro. Car. 366; Sir Wm. Jones, 342.

Limitation over in default of *such* issue, or without *leaving* issue does not cut down fee.

An estate in fee simple is not cut down to an estate tail by a limitation over "in default of *such* issue," or, "without *leaving* issue."

Thus "for default of such issue:" *Idle* v. *Cook* (1705) 2 Ld. Raym. 1144; 2 Salk. 620; 1 P. Wms. 70; 11 Mod. 57; Holt, 164; "for want of such:" *Bayley* v. *Morris* (1799), 4 Ves. 788; "without leaving issue:" *Olivant* v. *Wright* (1878), 9 Ch. D. 646; do not cut down an estate in fee simple.

Limitation over in default of "such issue" proceeding from specified body does cut down fee.

But if the context show that the issue is to proceed from a specified body, the fee simple is cut down to an estate tail.

Limitation to the use of the first son who shall have issue male *of his body* and to his heirs, and for default of such issue over. *Held*, tail in the son: *Beck's Case, alias Burton* v. *Nichols* (1630), Litt. Rep. 159, 253, 285, 315, 344; S. C. *sub nom. Boreton* v. *Nicholls*, Cro. Car. 363.

In *Beresford's Case* (1607), 7 Rep. 41 a, a limitation in remainder "to the use of A. and of the heirs male of the said A. *lawfully begotten*, and for default of such issue," over, was held, on the construction of the whole deed, to give to A. an estate in tail male. Willes, C.J., says (*Goodright* d. *Goodridge* v. *Goodridge* (1742), Willes, 369 at p. 374), that this case "can hardly be cited as an authority, unless a deed of uses should happen to be penned exactly in the same words."

In *Shelley* v. *Earsfield* (1662), 1 Rep. in Ch. 206, where the limitations were, to the use of A. for life, remainder to the use of the heirs of A. *lawfully begotten*, and for want of such issue

remainder (subject to some prior limitations) to the use of B. (A.'s brother) for ninety-nine years if he should so long live; it was held that A. took in tail. No reasons were given for the decision, which probably turned on the rule that a limitation over on failure of issue to a person who can be heir cuts down the original limitation to an estate tail.

Personalty.

In a marriage settlement a leasehold estate was settled in trust for husband and wife for life; after the decease of the survivor the trustees were to assign it with the rents and profits to the eldest son, "for want of such issue of such son" to the daughters. The only son died without issue in the mother's life. *Held*, that a surviving daughter took the estate: *Exel* v. *Wallace* (1751), 2 Ves. Sen. 117, and, on appeal, 318. It will be noticed that it was an executory trust and the words were very peculiar.

"Or" without issue read "and."

In a limitation to A. in fee simple, or to A. for life with remainder to his issue, with a gift over on his death before the happening of a certain event, *or* without issue, "*or*" will be construed "*and*."

Surrender of copyholds to the use of S. for life, remainder to the use of his wife E. during widowhood, remainder to the use of W. for life, remainder to the use of the issue of his body; with a proviso that if W. should die in the lifetime of S. *or* without issue of his body, then the surrendered premises should go over. *Held*, that "*or*" must be read "*and*," and that the gift over would only take effect if W. died in the lifetime of S. without issue: *Wright* v. *Kemp* (1789), 3 T. R. 470; cf. *Right* v. *Day* (1812), 16 East, 67.

The corresponding rule as to wills is stated and discussed, Jarman on Wills, c. 16, p. 471 (5th ed.); Hawkins, 203; Theobald on Wills, c. 49, p. 674 (6th ed.).

Limitation to children not enlarged by limitation over in default of such issue.

A limitation to a child, or to children generally, will not be enlarged to an estate tail in such child or children merely by a limitation over "in default of such issue."

Remainder in a settlement, after successive estates tail in the sons, "to the use of all and every the daughters of the body of the said A. on his said wife to be begotten as tenants in common and not as joint tenants, and for default of such issue, to the right heirs of A." It was admitted without argument that the daughters took for life only: *Snell* v. *Silcock* (1800), 5 Ves. 469; *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193.

CHAPTER XVIII.

ESTATES FOR LIFE—SEPARATE ESTATE—RESTRAINT ON ANTICIPATION—ESTATES *PUR AUTRE VIE.*

Limitations of Estates for Life : Estate not enlarged by direction to pay Money ; or because Trustees take a Fee : Indefinite Trust of Income of Personalty is Trust of Capital : Determinable Life Estate : Life Estate till Separation : Life Estate until Alienation : Until Bankruptcy : Separate Use of Married Woman : Words creating Separate Use : Separate Use of Remainder : How far revives on Remarriage : Restraint on Anticipation of Property given for Separate Use : Words creating Restraint : Restraint on Remainder : Restraint Revives on Remarriage : Estates pur autre vie : No Words of Limitation necessary to Create or Convey : Devolution on Death determined by Words of Limitation : Heir takes as Special Occupant : How Executors take : Devolution can be Changed : No Words of Limitation necessary for Equitable Interests : Settlements of Estates pur autre vie : Quasi Estates Tail in Estates pur autre vie : How far Barrable.

Having discussed in a previous chapter the construction of limitations where the word "heirs" occurs, it remains to consider the construction of limitations which do not comprise the word "heirs."

Grant to A. by owner in fee;

A grant by a man seised in fee simple of land to "A.," or to "A. and his assigns," or to "A. and his issue," or to "A. and his seed," or to "A. for ever," or to "A. for life," confers on A. an estate for his own life : Litt. ss. 1 and 283 ; Co. Litt. 42 a ; Shep. Touch. 105, 106, 107, 110 ; if the grantor be seised in tail or for life, A. takes an estate for the life of the grantor : Co. Litt. 42 a ; Shep. Touch. 105, 107, 110 ; and if the grantor be possessed of a term, A. takes the whole term, unless the grant be to A. for life expressly : Shep. Touch. 110.

in tail or for life ;

or of term.

Examples.

Limitation in a marriage settlement, after successive estates tail to the sons, to the daughters as tenants in common, and in default of such issue, over; admitted without argument that the daughters took for life only: *Snell* v. *Silcock* (1800), 5 Ves. 469 at p. 472.

Limitation in a marriage settlement to the "heir female of the body" of the settlor. *Held*, his daughters took a life estate: *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. N. S. Ch. 193.

Limitation to "next of kin." *Held*, they took a life estate: *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274.

"Heir."

The addition of the word "heir," or "heir of the body," does not enlarge the estate: Co. Litt. 8 b, *supra*, Chapter on Limitations to Heirs.

"Executors."

The addition of the word "executors" does not enlarge the estate. "A limitation extending a grant to the *executors*, will not in any deed enlarge the estate; the estate will be of the same quantity, notwithstanding the executors are named, as it would have been in case no mention had been made of them:" 1 Preston, Estates, 30; *Re Bird* (1876), 3 Ch. D. 214; but see *infra*, p. 352, as to conveyances of estates *pur autre vie*.

Direction that grantee shall pay money.

A direction that A. shall pay a sum of money does not enlarge the estate: *Wright* d. *Allingham* v. *Dowley* (1778), 2 Wm. Bl. 1185.

Legal fee limited to trustees.

The fact that the legal estate is limited to trustees in fee does not enlarge the estate: *supra*, Chapter on Limitations to Heirs.

The above rules apply only to real estate; it is otherwise with regard to personalty, for—

Trust of income for unlimited period carries the capital.

A trust of income of personalty for an unlimited period carries the capital.

"Supposing an absolute owner of personal property to give the income of his property to a person, what does that person take? He has a right to receive the income for ever, and having the right to the whole income he has the right to dispose of the capital which produces that income:" per North, J., *Re L'Herminier*, *Mounsey* v. *Buxton*, [1894] 1 Ch. 675 at p. 676.

Trust in a marriage settlement to stand possessed of the income of the trust funds for such persons as the wife should appoint, and subject to such appointment of the income, to stand possessed of the trust funds and the income thereof upon certain trusts therein declared. *Held*, that the wife had a power to appoint the capital of the trust funds: *Re L'Herminier*, *Mounsey* v. *Buxton*, [1894] 1 Ch. 675.

A life estate may be made determinable on an event during life.

Estates for life determinable.

"If a man grant an estate to a woman *dum sola fuit* or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay 10*l.*, &c., or until the grantee be promoted to a benefice, or for any like incertaine time . . . in all these cases, if it be of lands or tenements the lessee hath in judgment of law an estate for life determinable, if livery be made: and if it be of rents, advowsons, or any other thing that lie in grant he hath a like estate for life by the delivery of the deed:" Co. Litt. 42 a; Shep. Touch. 105, 106; 2 Blackst. Com. 121.

Lease till a certain sum be paid.

If a lease be made of land to A., without words of limitation, till a certain sum be paid, "in this case, because the annual profits are uncertain, he hath an estate for life, if livery be made, determinable upon the levying of" the sum: Co. Litt. 42 a; *Manning's Case* (1609), 8 Rep. 94 b at p. 95 b. But, formerly, it was but an estate at will without feoffment, for it is not certain that the land shall be every year of the same annual value: *Bishop of Bath's Case* (1605), 6 Rep. 34 b at p. 35 b.

Grant of rent till certain sum be paid.

"If a man grant a rent of 20*l.* per annum till 100*l.* be paid, there he hath an estate for five years, for there it is certain and depends upon no uncertainty:" Co. Litt. 42 a.

How far a gift over on separation is good.

A condition in a marriage settlement that, "in case a separation shall take place," rents, which were by the trusts of the settlement payable to the wife during her life, should thenceforth during the joint lives of husband and wife be paid to the husband, was held bad in *Cartwright* v. *Cartwright* (1853), 3 D. M. & G. 982; and a limitation over in a marriage settlement upon the separation of husband and wife was held void in *H.* v. *W.* (1857), 3 K. & J. 382, (where the trusts were to pay certain income during the joint lives of husband and wife "if she should so long continue to live with him and should not live separate and apart from him through any fault of her own," to her, and after the decease of either of them, "or in the event of the" wife "living separate and apart from the husband through any such fault as aforesaid, thereupon and immediately after the happening of such an event upon trust" for the survivor in case of death, or the husband in case of separation, for his or her life); but a trust by way of limitation in a post-nuptial settlement of rents to a woman for life or "so long as she shall continue the cohabiting wife or the widow" of the settlor,

and "from and after the dissolution of their marriage or judicial separation between them" for the settlor, was held good, and to determine on her ceasing to live with her husband, in *Re Hope Johnstone, Hope Johnstone* v. *Hope Johnstone*, [1904] 1 Ch. 470.

Life estates may be given over on alienation,

A life interest can be limited until, or given over upon, alienation.

Property may be limited to a tenant for life until alienation, voluntary or involuntary, otherwise than by bankruptcy, even if the property be the property of the tenant for life himself, and the interest thus limited determines on alienation: *Brooke* v. *Pearson* (1859), 27 Beav. 181; *Knight* v. *Browne* (1860), 9 W. R. 515; *Hammond* v. *Barrett* (1869), 21 L. T. 321 (this case is explained by Stirling, J., *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505 at p. 513); *Re Detmold, Detmold* v. *Detmold* (1889), 40 Ch. D. 585; and property may be limited to a tenant for life until bankruptcy by persons other than himself, and the interest thus limited determines on bankruptcy: *Ex parte Hinton* (1808), 14 Ves. 598; *Re Ashby, Ex parte Wreford*, [1892], 1 Q. B. 872; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Stephenson, Ex parte Brown*, [1897] 1 Q. B. 638; but such a limitation of the settlor's own property does not determine on bankruptcy, but so far as is necessary for the payment of his creditors is deemed a life estate: *Higinbotham* v. *Holme* (1812), 19 Ves. 88; *Wilson* v. *Greenwood* (1818), 1 Swans. 471 at p. 481; *Lester* v. *Garland* (1832), 5 Sim. 205; *Ex parte Barter* (1884), 26 Ch. D. 510 at p. 519; *Re Moon* (1886), 17 Q. B. D. 275; *Re Brewer, Morton* v. *Blackmore*, [1896] 2 Ch. 503; *Merry* v. *Pownall*, [1898] 1 Ch. 306; but if the whole property is not required for his creditors the limitation *quâ* the bankrupt ceases on his bankruptcy: *Re Johnson Johnson, Ex parte Matthews, Wilkinson* v. *Johnson Johnson and Dibb*, [1904] 1 K. B. 134.

or bankruptcy,

unless settlor's own property.

Settlor's own property may be given over so far as purchased by others.

Such a limitation, moreover, even of the settlor's own property, will be upheld to the extent to which another may be deemed to have purchased such property.

"There have been many decisions as to the application of this principle to marriage settlements, and it has been long established that if husband and wife both bring property into such a settlement a trust of the income of the wife's property in favour of the husband until his bankruptcy is good, while a similar trust of the income of the husband's property is bad:" [*i.e.*, that the clause of cesser or gift over, is inoperative] "see *Lockyer* v. *Savage* (1732), 2 Stra. 947; *Higinbotham* v. *Holme* (1812), 19 Ves. 88. If, however, the

wife's fortune is not brought into settlement, but is paid over to the husband, then it has been held that a trust of the income of the husband's own property in favour of himself until bankruptcy is good to the extent of the wife's fortune received by him: *Ex parte Cooke* (1803), 8 Ves. 353; *Ex parte Hodgson* (1812), 19 Ves. 206; *Re Meagham* (1803), 1 Sch. & Lef. 179; *Higginson* v. *Kelly* (1810), 1 Ball & Beat. 252; *Lester* v. *Garland* (1832), 5 Sim. 205; and per Wood, V.-C., *Whitmore* v. *Mason* (1861), 2 J. & H. 204 at p. 214;" per Stirling, J., *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505 at p. 511.

Post-nuptial settlements.

The doctrine of *quasi*-purchase of part of the husband's fortune applies to post-nuptial settlements: *Montefiore* v. *Behrens* (1865), L. R. 1 Eq. 171; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; and is not affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3: *Mackintosh* v. *Pogose* [1895], 1 Ch. 505; which is also the only case in which a direction that a limitation for life should cease on alienation (as distinguished from a limitation for life or until alienation) has been held good, no reference being made to such distinction.

Mere prohibition against alienation void.

A mere prohibition against alienation is void: *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1903] 1 Ch. 933.

Where tenant for life is already bankrupt

A trust for payment of income until a man "shall become bankrupt, &c.," is rendered nugatory by his being bankrupt at the date of the settlement: *Manning* v. *Chambers* (1847), 1 De G. & Sm. 282; but in *West* v. *Williams*, [1899] 1 Ch. 132, it was held, reversing Kekewich, J., [1898] 1 Ch. 488, that where a man who had already mortgaged his life interest settled it upon himself "until he shall assign charge or incumber the same," the words had not a retrospective operation, so as to include the mortgage already created.

Property may be given to woman for separate use.

> Property, whether real or personal, and any interest therein, whether absolute or for life, can be limited to, or in trust for, a woman for her separate use during coverture.

If unmarried attaches on her marriage.

The woman need not be married when the limitation or trust takes effect, for if she subsequently marries, the separate use attaches and lasts during the coverture: *Tullett* v. *Armstrong* (1839), 4 My. & Cr. 377; but "there is no such thing as separate property of an unmarried woman:" per Kay, L.J., *Pelton Bros.* v. *Harrison*, [1891] 2 Q. B. 422 at p. 425.

Effect of Married Women's Property Act on separate estate.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 2: "Every woman who marries after" 1882 "shall be entitled to have and to hold as her separate property and to dispose of" by will or otherwise in the same manner as if she were a *feme sole* without the intervention of any trustee "all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage;" and by sect. 5 of the same Act "every woman married before" 1883 "shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder" (which means her first title to the property: *Reid* v. *Reid* (1886), 31 Ch. D. 402), "shall accrue after" 1882; but, though a large mass of property thus becomes the separate property of married women, by sect. 19 of the same Act, "nothing in this Act contained shall interfere with or affect" (which means invalidate or render inoperative: per Lindley, L.J., *Re Armstrong* (1888), 21 Q. B. D. 264 at p. 270) "any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman," and therefore all settlements must be construed as if the Act had not been passed: *Hancock* v. *Hancock* (1888), 38 Ch. D. 78; *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; *Buckland* v. *Buckland*, [1900] 2 Ch. 534. Consequently property which is separate property under the Act is not "property settled to her separate use" within the exception of a covenant to settle after acquired property contained in a marriage settlement: *Re Stonor* (1883), 24 Ch. D. 195; *Re Whitaker*, *Christian* v. *Whitaker* (1887), 34 Ch. D. 227.

As regards marriage settlements.

What words will create separate use.

In a limitation to or trust for a woman any expression, from which the intention to exclude a husband can be clearly inferred, will have the effect of creating a separate use during coverture.

"I take the principle, therefore, to be now thoroughly established that Courts of Equity will not deprive the husband of his rights at law unless there appears to be a clear intention manifested by the testator that the husband should be so excluded. If these be the principles that regulate the construction of a will, how much more forcibly ought they to apply to a case like the present of a limitation contained in a deed?" per Lord Brougham, C., *Tyler* v. *Lake* (1831), 2 Russ. & My. 183 at p. 188.

"The intention to give a separate estate must be clearly expressed:" per Leach, M.R., *Kensington* v. *Dolland* (1834), 2 My. & K. 184 at p. 188; 3 L. J. N. S. Ch. 209.

"For separate use there must be words referring to the event of marriage, and creating a separate character or directing an exclusive enjoyment:" per Lord Westbury, C., *Spirett* v. *Willows* (1865), 34 L. J. Ch. 365 at p. 368; 13 W. R. 329 at p. 330.

Restraint on anticipation does not create separate use.

Words imposing a restraint on alienation or anticipation unaccompanied by words creating a separate use do not by implication create a separate use, but are merely void: *Baggett* v. *Meux* (1844), 1 Coll. 138; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661: per Lindley, L.J., *In re Lumley*, [1896] 2 Ch. 690 at p. 694.

More easily created in marriage settlements than in other deeds.

Though as a general rule words, which in a will would not be sufficient to create a separate use, are insufficient to do so when contained in a deed (see per Lord Brougham, C., *Tyler* v. *Lake* (1831), 2 Russ. & My. 183 at p. 188), yet they may be sufficient when contained in a marriage settlement. "Taking the word 'sole' as applied to the case of a marriage settlement—to a case of contemplated devolution of property upon a married (*sic, sed quaere*) lady at a time when she is about to put herself in such a position that unless she be guarded and defended as to that which is her property and under her own control and management, the husband will acquire together with her an interest in it—in all those cases the word 'sole' finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband, and to give to her the sole and absolute disposition of it:" per Lord Hatherley, C., *Massy* v. *Rowen* (1869), L. R. 4 H. L. 288 at p. 297.

Separate use created in deeds not marriage settlements.

The following words have been held sufficient to create a separate use in deeds not being marriage settlements: "as though she was a single woman," in a deed of assignment of leaseholds operating as a declaration of trust by a husband: *Baddeley* v. *Baddeley* (1878), 9 Ch. D. 113; "not to be assignable, &c." in a trust deed providing pensions for the widows and children of clerks in the East India Company's service: *Re Peacock's Trusts* (1879), 10 Ch. D. 490; "as her separate estate" in an assignment of leaseholds operating as a declaration of trust by a husband: *Fox* v. *Hawks* (1879), 13 Ch. D. 822; "own proper use and benefit," and she to have "full power and authority to sue and give receipts," in a deed of gift made by a husband: *Surman* v. *Wharton*, [1891] 1 Q. B. 491: while the following words have been held not sufficient to do so in such deeds: "into their own proper and

Not so created.

respective hands to and for their own respective use and benefit": *Tyler* v. *Lake* (1831), 2 Russ. & My. 183; "for her own use and benefit:" *Kensington* v. *Dolland* (1834), 2 My. & K. 184; 3 L. J. N. S. Ch. 209; "in trust only for:" *Spirett* v. *Willows* (1865), 34 L. J. Ch. 365; 13 W. R. 329; "to and for her and their own use and benefit," in an ultimate trust in default of issue: *Darcy* v. *Croft* (1858), 9 Ir. Ch. R. 19. The deed was a marriage settlement, but the question arose on the ultimate trusts and not on the wife's life estate, and therefore the construction was similar to that of deeds not being marriage settlements.

Separate use created in marriage settlements.

The following words have been held sufficient to create a separate use in marriage settlements: "sole use benefit and disposition:" *Ex parte Ray* (1815), 1 Madd. 199; "for her own sole and separate use:" *Williams* v. *Waters* (1845), 14 M. & W. 166; "full and sole use and benefit;" *Arthur* v. *Arthur* (1848), 11 Ir. Eq. R. 511; a direction that a jointure should be paid to K. "without the power of anticipation, . . . the sole and separate receipt of the said K. to be a complete and only discharge:" *Re Molyneux's Estate* (1872), Ir. R. 6 Eq. 411.

The cases on wills are collected in Theobald on Wills, c. 45, (6th ed.), pp. 615 *et seq.*

Remainder given for separate use.

When the interest of the woman is not in possession, but is in remainder, a question may arise whether the separate use attaches at once, so that the woman, if married, can dispose of her interest immediately, or whether it only arises when the interest falls into possession. The cases are perhaps not easily reconcilable.

When a married woman takes a vested reversionary interest for her separate use, it arises immediately: *Sturgis* v. *Corp* (1806), 13 Ves. 190; *Re Molyneux's Estate* (1872), Ir. R. 6 Eq. 411.

Where policies of assurance on the life of the husband were assigned to trustees on trust to receive the money and pay the income to the wife for her separate use, it was held that the separate use did not arise during the husband's life: *King* v. *Lucas* (1883), 23 Ch. D. 712; *Re Shakespear* (1885), 30 Ch. D. 169.

Contingency.

Where a married woman takes a life estate on the happening of a mere contingency (such as the insolvency of her husband) for her separate use, the separate use does not attach till the contingency happens: *Mara* v. *Manning* (1845), 2 Jo. & Lat. 311; *Bestall* v. *Bunbury* (1861), 13 Ir. Ch. R. 549; *Keays* v. *Lane* (1869), Ir. R. 3 Eq. 1.

Whether separate use revives on remarriage.

It was said, in *Tudor* v. *Samyne* (1692), 2 Vern. 270, citing *Sir Edward Turner's Case* (1681), 1 Vern. 7, that where property is given *absolutely* to a married woman for her separate use, the

separate use does not revive on her second marriage; but in *Tullett* v. *Armstrong* (1839), 4 My. & Cr. 377, it is stated by the reporter (p. 389) that the property in question in *Tudor* v. *Samyne* was not settled to the woman's separate use, and it appears from the report in 1 Vern. that in *Sir Edward Turner's Case* also, the property was not settled to the woman's separate use, and Lord Cottenham, C., in his judgment in *Tullett* v. *Armstrong* says (p. 394): "If *Sir E. Turner's Case* be correctly stated in *Tudor* v. *Samyne*, which differs from the report in 1 Vern. 7, and if *Tudor* v. *Samyne* be itself accurately reported, they would be instances of property settled to the separate use of a woman being alienable by an after taken husband. I do not, however, think that either is of any value upon the present question. They are of too early a date: the accuracy of the report upon this subject cannot be depended upon, and the point was not raised or argued and cannot be said to have been decided." The point has not arisen since.

Separate use of a life interest revives.

Where, however, property is given for life only for a woman's separate use, the separate use revives on her re-marriage: *Re Gaffee* (1850), 1 Mac. & G. 541; on appeal from 7 Ha. 101; *Hawkes* v. *Hubback* (1870), L. R. 11 Eq. 5; and she can of course deal with the property while not under coverture; *Wright* v. *Wright* (1862), 2 J. & H. 647.

Divorce.

In the case of *Shafto* v. *Butler* (1871), 40 L. J. Ch. 308; 19 W. R. 595, part of the husband's property was settled during the joint lives of himself and his wife for her separate use without power of anticipation. The wife obtained a divorce and married again during the husband's life. *Held*, that the separate use and restraint on anticipation revived.

Restraint on anticipation is only applicable to separate use.

A restraint on anticipation can be attached to property given to a married woman for her separate use, but to no other property.

"Can a *feme sole*, or can a man, be restrained from anticipating or disposing by way of anticipation of any property to which she or he is entitled? No. A married woman under coverture can, but how and why? Simply as regards property settled to her separate use:" per Cotton, L.J., *Pike* v. *Fitzgibbon* (1881), 17 Ch. D. 454 at p. 464.

"A restraint on anticipation can never exist except as an accessory to a trust for a separate use": per Fry, L.J., *Stogdon* v. *Lee*, [1891] 1 Q. B. 661 at p. 670. A restraint on anticipation can be annexed to property which is only separate estate by virtue of

the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75): *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690.

Restraint on anticipation can be imposed on any property given for separate use.

A restraint on anticipation can be attached to any property given to a married woman for her separate use, whether real or personal, and whether the interest therein be absolute or for life.

"The object of the doctrine" (*i.e.*, the doctrine of separate use) "was to give a married woman the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal:" per Lord Lyndhurst, C., *Baggett* v. *Meux* (1846), 1 Ph. 627 at p. 628.

Life interest *sans* waste.

A restraint on anticipation can be attached to a life interest without impeachment of waste: *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690.

If unmarried attaches on marriage.

The woman need not be married when the limitation or trust takes effect, for if she subsequently marries, the restraint on anticipation attaches and lasts during the coverture: *Tullett* v. *Armstrong* (1839), 4 My. & Cr. 377.

What words will impose restraint.

No particular form of words is necessary in order to impose a restraint on anticipation: per Lord Cranworth, V.-C., *Re Ross's Trust* (1851), 1 Sim. N. S. 196 at p. 199; but the restraint will not be imposed unless the language is clear.

Restraint imposed.

Trust in a marriage settlement during the wife's life to receive the income *as it should become due*, and pay it to such person as she should from time to time appoint, or permit her to receive it for her separate use, with a declaration that her receipt or the receipts of any person or persons to whom she might appoint it *after it became due* should be discharges. *Held*, to impose a restraint on anticipation: *Field* v. *Evans* (1846), 15 Sim. 375. This decision is said by Stuart, V.-C., to be wrongly reported: *Baker* v. *Bradley* (1854), 2 Sm. & Giff. 531 at p. 561, but was approved in *Baker* v. *Bradley* (1855), 7 De G. M. & G. 597 at p. 612, by Knight-Bruce, L.J., who sent for the record; *Ibid.* at p. 609.

Covenant in a marriage settlement to settle the wife's after-acquired property on trust to pay the income to the wife or her appointees, to the intent that the same might remain a separate

personal and inalienable provision for her during the coverture, and on further trust to pay, assign, or otherwise dispose of the same from time to time to the wife's appointees by deed or will. *Held*, that the wife was entitled to an interest during the coverture for her separate use without power of anticipation, with power to appoint the reversion expectant on the interest reserved to her during coverture: *Spring* v. *Pride* (1864), 4 De G. J. & S. 395.

"The receipts of her for the rents to be given as the same should become due from time to time." *Held*, a restraint on anticipation: *Re Smith, Chapman* v. *Wood* (1884), 51 L. T. 501.

Restraint not imposed.

Payment of income to be made to such persons as the wife "from time to time" should direct. *Held*, not a restraint: *Pybus* v. *Smith* (1791), 3 Br. C. C. 340.

The cases on wills are collected in Theobald on Wills, c. 45 (6th ed.), p. 620.

Separate estate is alienable without express power.

It was thought formerly, before the nature of separate estate was thoroughly understood, that a woman could not dispose of her separate estate unless she had an express power to do so; and accordingly the older forms gave the woman express power to dispose of the property, with a direction that, until and in default of any exercise of the power, the income was to be paid to her for her separate use.

Restraint annexed to power only.

In some of the older cases, where the restraint on anticipation was annexed to the power only, it was held that, though the property could not be disposed of by anticipation under the power, yet it might be disposed of under the proprietary right conferred by the trust for separate use: *Barrymore* v. *Ellis* (1836), 8 Sim. 1; but this opinion was long since overruled: *Harnett* v. *Macdougall* (1845), 8 Beav. 187; *Brown* v. *Bamford* (1846), 1 Phil. 620.

Restraint annexed to a remainder.

If the restraint is annexed to a reversionary interest a question may arise whether the restraint only prevents dealing with the interest before it falls into possession, or prevents also dealing with it when in possession.

In *Re Bown* (1884), 27 Ch. D. 411, all the prior cases are discussed, and it was decided by the Court of Appeal that the effect of the restraint depends entirely on the intention expressed. If the fund itself is given to the woman she is entitled to have it paid to her, the only effect of the restraint being to prevent her from dealing with it before it falls into possession; but, on the other hand, if the income only is given to her, the trustees must retain the fund, and pay the income only to her without anticipation during coverture. All the cases are cases on wills.

The restraint on anticipation revives on a second marriage:

Restraint revives on remarriage.

Tullett v. *Armstrong* (1839), 4 My. & Cr. 377; *Re Gaffee* (1850), 1 Mac. & G. 541; *Shafto* v. *Butler* (1871), 40 L. J. Ch. 308; 19 W. R. 595; unless confined to a particular coverture: *Re Gaffee* (1850), 1 Mac. & G. 541.

Estates *pur autre vie.*

With regard to estates *pur autre vie,* a grant to A. for the life of B. gives A. an interest during B.'s life though B. may survive A., for—

Words of limitation not necessary to create estate *pur autre vie:*

> No words of limitation are necessary for the creation of an estate *pur autre vie.*

The authorities for this proposition are: Co. Litt. 41 b; Shep. Touch. 106; *Castle* v. *Dod* (1617), Cro. Jac. 200: per Brady, L.C. (Ir.), *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87 at p. 93: and it appears to be the better opinion that—

nor on conveyance of estate *pur autre vie,* if intention to pass whole interest apparent.

> No words of limitation are necessary for the effectual conveyance of an estate *pur autre vie* by the owner thereof to a grantee; but an intention to pass the whole interest must be shown.

The chief authorities for this proposition are: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681 (as to estates not originally limited to the grantee and his heirs); *Doe* d. *Kerr* v. *Cassidy* (1807), 1 Hud. & Bro. 222, n.; *Northen* v. *Carnegie* (1859), 4 Drew. 587; *M'Clintock* v. *Irvine* (1860), 10 Ir. Ch. Rep. 480; *In re Bayley* (1863), 16 Ir. Ch. Rep. 215; *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87; *Currin* v. *Doyle* (1878), 3 L. R. Ir. 265; *sed contrà Dawson* v. *Dawson* (1850), 13 Ir. L. R. 472; *Barron* v. *Barron* (1858), 8 Ir. Ch. Rep. 366 (affirmed on appeal on another point, Ball, J., doubting whether words of limitation were necessary (1859), 10 Ir. Ch. Rep. 120); *Lamphier* v. *Drapes* (1863), 14 Ir. Ch. Rep. 33.

But intention to transfer all the interest must be shown.

It is sufficient to vest the lands in the grantee for the whole interest of the tenant *pur autre vie:* as *e.g.,* if the tenant *pur autre vie* assign the lands and all her right, title and interest to the use of the grantee: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681; or grant the lands to the grantee, his executors, administrators, and assigns: *Northen* v. *Carnegie* (1859), 4 Drew. 587; or grant the lands to the grantee for the life of the *cestui que vie;* or grant his estate in the lands to the grantee; or grant the land to the grantee and his heirs: per Brady, L.C. (Ir.), *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87, at pp. 97–100. But in some way or another the deed must show an intention to pass the whole *quasi*-fee: per Brady, L.C., *ubi sup.* And a mere conveyance of the lands to the grantee will not vest in him an estate not determinable

on his own death in the life of the *cestui que vie:* per Bayley, J., *Doe* d. *Jeff* v. *Robinson* (1828), 8 B. & C. 296 at p. 305; 2 Man. & R. 249; but it may be that sect. 63 of the Conveyancing Act, 1881, (44 & 45 Vict. c. 41) which enacts that every conveyance is, unless a contrary intention is expressed, effectual to pass all the estate, &c., which the conveying parties have in the property conveyed, or which they have power to convey, makes any conveyance sufficient to pass the whole estate *pur autre vie.*

Effect of Conveyancing Act.

Although no words of limitation are necessary to vest in the grantee the whole estate *pur autre vie,* and to give him a complete power of disposition thereover, yet the devolution of an estate *pur autre vie* on the death of a tenant *pur autre vie,* who has died during the life of the *cestui qui vie* without having disposed of the same *inter vivos* or by will, is determined according to what, if any, words of limitation have been used in the creation of the estate or the conveyance thereof to the deceased.

Devolution determined by words of limitation.

If lands were limited to the grantee and his heirs *pur autre vie,* then on his death during the life of the *cestui que vie* without having disposed of the estate *inter vivos* or by will, the whole legal and beneficial interest vested (before the Land Transfer Act, 1897, came into force) in the heir of the deceased, who took, however, not by descent, but as special occupant: Co. Litt. 41 b; in the same manner, and, since the Statute of Frauds, subject to the same liabilities for debts, &c., as if the deceased had been seised thereof in fee simple. But by the Land Transfer Act, 1897, s. 1 (1), estates *pur autre vie,* in common with other estates, now devolve upon the legal personal representatives of the deceased, and by sect. 2 (1) the legal personal representatives hold the same, subject to their powers and duties in the administration, in trust for the persons by law beneficially entitled thereto, viz., in the case supposed the heir.

If limited to "heirs" heir takes as special occupant.

If borough English lands be limited to one and his heirs *pur autre vie,* on the death of the tenant without having disposed thereof, his customary heir is the special occupant: *Baxter* v. *Doudswell* (1675), 2 Lev. 138; 3 Keb. 475, 486, 498; *Townsend's Case,* cited by Holt, C.J., in *Clements* v. *Scudamore* (1703), 2 Ld. Raym. 1024, at p. 1028; 1 Salk. 243.

Customary heir.

As before mentioned, the heir takes not as heir by descent of an estate of inheritance, but as the special occupant marked out by the terms of the grant: *Whiskins* v. *Davie* (1610), 2 Roll. Abr. 151 D. 2; *Bowles* v. *Poor* (1611), 1 Bulstr. 135; and see per Talbot, L.C., *Chaplin* v. *Chaplin* (1735), 3 P. Wms. 365 at p. 368; per Verney, M.R., *Kendal* v. *Micfield* (1740), Barnard. Ch. 46 at p. 48; per

Kenyon, C.J., *Doe* d. *Blake* v. *Luxton* (1795), 6 T. R. 289 at p. 291; per Kindersley, V.-C., *Northen* v. *Carnegie* (1859), 4 Drew. 587 at p. 590; and per Fry, J., *In re Barber's Settled Estates* (1881), 18 Ch. D. 624, at p. 627. The opinion that the heir in such a case took as heir of a descendible freehold is now generally abandoned. The chief authorities in its favour are: equivocal observations of Bracton, Lib. 2, cap. ix. (*haeredes ei succedent*), and of Lord Coke in *Edward Seymor's Case* (1612), 10 Rep. 95 b at p. 98 a; a *dictum* in *Walsingham's Case* (1572), Plow. 547 at p. 556; the dissenting judgment of Vaughan, C.J., in *Holden* v. *Smallbrooke* (1670), Vaugh. 187, at p. 201; and the judgment of De Grey, C.J., in *Doe* d. *Lempriere* v. *Martin* (1777), 2 Wm. Bl. 1148 at p. 1150.

The point is of some importance, as by sect. 4 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the personal representative of a deceased vendor has power to convey the freehold interest "descendible to heirs general" in land contracted to be sold.

If not limited to heirs legal personal representatives take.

If the estate *pur autre vie* be limited to the grantee, without words of limitation, or to the grantee and his assigns, or to the grantee, his executors, administrators and assigns, it vests, on the death of the grantee during the life of the *cestui que vie* without having disposed thereof *inter vivos* or by will, in his legal personal representatives as part of his personal estate: Statute of Frauds, 29 Car. II. (1677) c. 3, s. 12; 14 Geo. II. (1741) c. 20, s. 9; and Wills Act, 1837 (1 Vict. c. 26), s. 6, which replaces the earlier statutory provisions. Prior to the Statute of Frauds, if the executors were not named in the limitations, the estate was subject to general occupancy.

Quaere, how they take.

There was, and still is, some doubt whether the legal personal representatives, when mentioned in the limitations, prior to the Statute of Frauds took, and whether they now take, as special occupants, or by virtue of the Statutes. The better opinion seems to be that they took, and take, as special occupants: 2 Roll. Abr. 151, G. 2; *Duke of Devonshire* v. *Atkins* (1726), 2 P. Wms. 381; *Kendal* v. *Micfield* (1740), Barnard. Ch. 46; *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681; *Ripley* v. *Waterworth* (1802), 7 Ves. 425; *In re Michell, Moore* v. *Moore*, [1892] 2 Ch. 87; *sed contrà*, per Lord Redesdale, *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281 at p. 289.

But since the Statute of Frauds, it makes no difference how they take, for even if they take as special occupants, they take the estate impressed with a trust for the persons entitled under the will or intestacy of the deceased: *Duke of Devonshire* v. *Atkins* (1726),

2 P. Wms. 381; *Ripley* v. *Waterworth* (1802), 7 Ves. 425; *In re Michell, Moore* v. *Moore* [1892], 2 Ch. 87.

Examples.

H., to whom a rent-charge had been limited to him and his assigns, conveyed it to K., his executors, administrators and assigns, habendum to K., his heirs and assigns, in trust for K. his executors, administrators and assigns; on K.'s death it was held that the rent-charge devolved upon K.'s heir as special occupant in trust for K.'s executors: *Kendal* v. *Micfield* (1740), Barnard. Ch. 46. If there be a grant to A. and his executors for the life of B., habendum to A. and his heirs for the life of B., his heirs shall have the benefit; if there be a grant to A. and his heirs for the life of B., habendum to A. and his executors for the life of B., the executors shall have the benefit: per Verney, M.R., *Kendal* v. *Micfield* (1740), Barnard. Ch. 46 at p. 48.

Under a declaration of trust of an estate *pur autre vie*, in favour of A., his heirs, executors, administrators and assigns, the heir, not the legal personal representative, is entitled: *Atkinson* v. *Baker* (1791), 4 T. R. 229.

Lands were demised to H. T., her heirs and assigns, habendum to H. T. and her assigns, for the life of G. T.; that part of the habendum which merely qualified the estate granted in the premises by cutting it down to an estate *pur autre vie* was accepted, but that part which was repugnant to the premises by reason of its not limiting the estate to the heir as special occupant was rejected: *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663; 3 G. & D. 622; 12 L. J. Q. B. 272.

Devolution can be changed by owner.

"A tenant *pur autre vie* may alter the nature of the limitation, that is to say, if the estate be limited to him and his heirs, he may grant or devise it to another and his executors, and *vice versâ*:" per Verney, M.R., *Kendal* v. *Micfield* (1740), Barnard. Ch. 46 at p. 48.

"It has long since been established that in determining the quality of an estate *pur autre vie*, that is, whether it goes to a special occupant or to the executor by Statute, you look to the terms of the last conveyance of the estate, and not to the original grant, to ascertain whether it is to go to the heir or to the legal personal representative. If it is to go to the heir my present impression is that express words are necessary, and that in a deed, at all events, the word 'heir' must be used for the purpose of designating the special occupant:" per Lord Davey, *Earl of Mountcashell* v. *More-Smyth*, [1896] A. C. 158 at p. 165.

Quaere whether devolution changed

There appears to be some doubt whether, if an estate *pur autre vie* be limited to one and his heirs, and he grant or devise it to another without any words of limitation, it devolves on the heir of the

without express words.

grantee as special occupant, or on his executors or administrators under the Statutes; but the better opinion seems to be that it devolves on the executors.

The former view is supported by the following cases:—

Lands demised to A. and his heirs for three lives. A. devised to M., who died intestate. *Held*, that M.'s co-heiresses were entitled: *Philpotts* v. *James* (1784), 3 Dougl. 425.

Lands were demised to B. and his heirs for three lives. B. devised all his estate and interest therein to be divided equally between his three sons. One of the sons died, leaving the lessor of the plaintiff his heir-at-law; the defendant obtained administration; judgment was given for the lessor of the plaintiff and affirmed on appeal; *Jones* d. *Blake* v. *Blake* (1813), 1 Hud. & Bro. 227, n.; *Wall* v. *Byrne* (1845), 2 Jo. & Lat. 118; *Re King, King* v. *King*, [1898] 1 I. R. 91; [1899], 1 I. R. 30.

The latter view is supported by the following cases:—

A lessee of lands limited to himself and his heirs for lives devised his right and title in and to the same to M. K. On M. K.'s death, without having disposed thereof, it was held the estate went to her executors and not to her heir: *Doe* d. *Kerr* v. *Cassidy* (1807), 1 Hud. & Bro., 222, n.; *Jack* d. *Alexander* v. *Jamieson* (1811), 1 Hud. & Bro. 225, n.

Lands were demised to A., his heirs and assigns for lives. A. devised the same to B. and his assigns during the residue of the lease. *Held*, that the interest of A.'s heirs as special occupants being defeated and no special occupant being named in the devise, the estate went on B.'s death intestate to his administrator under the Statute of Frauds: *Doe* d. *Lewis* v. *Lewis* (1842), 9 M. & W. 662.

A share of freehold lands was conveyed to the testator, his heirs and assigns, for the life of the grantor. The testator devised the same to trustees and their heirs in trust for his grandson, and died; on the death of the grandson intestate, it was held that the grandson's administrator, and not his heir, was entitled (it being agreed that the testator's whole interest passed by the devise): *In re Inman*, [1903] 1 Ch. 241.

It follows from the fact that words of inheritance are unnecessary for the conveyance of estates *pur autre vie* that—

No words of limitation necessary in executed trusts.

Words of inheritance are unnecessary for the limitation of equitable interests in estates *pur autre vie* in executed trusts.

The authorities for this proposition are *M'Clintock* v. *Irvine* (1860), 10 Ir. Ch. Rep. 480; *In re Bayley* (1863), 16 Ir. Ch. Rep. 215; *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87; *Currin* v. *Doyle* (1878), 3 L. R. Ir. 265; *Earl of Mountcashell* v. *More Smyth*, [1896] A. C. 158; *contrà*, *Barron* v. *Barron* (1858), 8 Ir. Ch. Rep. 366.

Settlement of estates *pur autre vie.*

Lesser interests may be carved out of the absolute interest in an estate *pur autre vie* just as they may be carved out of an estate of inheritance in fee simple, and although estates *pur autre vie* are not entailable under the statute *De Donis Conditionalibus*, 13 Edw. I. (1284) c. 1, interests corresponding to estates tail may be created, and are called *quasi*-estates tail.

Quasi estates tail.

The heirs of the grantee's body may be made special occupants: 2 Roll. Abr. 151, G. 1; and see *Finch* v. *Tucker* (1690), 2 Vern. 184; *Baker* v. *Bayley* (1691), 2 Vern. 225; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wms. 266, n.; *Norton* v. *Frecker* (1737), West. t. Hardwicke, 203; 1 Atk. 524; *Allen* v. *Allen* (1842), 2 Dru. & War. 307.

For life with remainder.

So an estate *pur autre vie* may be limited to one for life, with remainders in *quasi*-fee or *quasi*-tail: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wms. 266, n.; *Low* v. *Burron* (1734), 3 P. Wms. 262; *Norton* v. *Frecker* (1737), West. t. Hardwicke, 203; 1 Atk. 524.

Executory limitations.

Or the absolute interest may be given to a grantee either immediately or in remainder with an executory limitation over on default of issue: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Saltern* v. *Saltern* (1742), 2 Atk. 376; *In re Barber's Settled Estates* (1881), 18 Ch. D. 624.

In all these cases the analogy of estates of inheritance is followed except that contingent remainders in estates *pur autre vie* were always indestructible in the sense in which contingent remainders in estates of inheritance were made indestructible by 8 & 9 Vict. (1845) c. 106, s. 8: *Pickersgill* v. *Grey* (1861), 30 Beav. 352; and that fines and recoveries were not, before the Fines and Recoveries Act (3 & 4 Will. IV. (1833) c. 74), and inrolled deeds are not, since that Act, necessary for barring *quasi*-estates tail.

Quasi estates tail.

The decisions as to *quasi*-estates tail are considered by Sir Ed. Sugden, C., in *Allen* v. *Allen* (1842), 2 Dr. & War. 307, and his judgment may be summarised as follows:—(i.) A *quasi*-estate tail is not to be compared to a fee simple conditional, and a *quasi*-tenant in tail does not on the birth of issue take an absolute interest or any greater power of alienation than he had before; he may bar the *quasi*-estate tail before issue born by act *inter*

vivos (*Grey* v. *Mannock* (1765), 2 Eden, 339, which is *contrà*, was disapproved). (ii.) Remainders may be limited after an estate in *quasi*-tail: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Low* v. *Burron* (1734), 3 P. Wms. 262. (iii.) *Quasi*-estates tail and remainders limited after them may be barred by any disposition *inter vivos* of the tenant in tail in possession, or the tenant for life and tenant in tail in remainder together: *Baker* v. *Bayley* (1691), 2 Vern. 225, where the lease was surrendered and renewed to the tenant in tail absolutely; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wms. 265, n. where tenant for life, a married woman, and tenant in tail in remainder levied a fine; *Norton* v. *Frecker* (1737), West. t. Hardwicke, 203; 1 Atk. 524, where tenant for life and tenant in tail in remainder made a re-settlement by deed; *Forster* v. *Forster* (1741), 2 Atk. 259, where the tenant for life was also, in events which had happened, first tenant in tail in remainder, and re-settled the land by deed; *Grey* v. *Mannock* (1765), 2 Eden, 339, also stated 6 T. R. 292, where the lease was surrendered and renewed to the tenant in tail in possession; *Blake* v. *Blake* (1786), 1 Cox, 266; 3 P. Wms. 10, n.; S. C. *sub nom. Doe* d. *Blake* v. *Luxton* (1795), 6 T. R. 289; *sub nom. Blake* v. *Luxton* (1815), G. Coop. 178, where the lease was surrendered and renewed to the tenant in tail in possession. (iv.) But such remainders limited after estates tail cannot be barred by the tenant in *quasi*-tail in remainder without the concurrence of the tenant for life: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wms. 265, n. (v.) It is doubtful whether a tenant in tail in remainder can without the concurrence of the tenant for life bar his own issue, and if so, whether, if he afterwards comes into possession, the remainders over will be barred without more.

Quasi-base fee.

In *In re Barber's Settled Estates* (1881), 18 Ch. D. 624, Fry, J., at p. 628, thought that an alienation by a *quasi*-tenant in tail in remainder without the concurrence of the *quasi*-tenant for life in possession probably "might be held to create a *quasi*-base fee."

Quasi estate tail not barred by will.

But a *quasi*-estate tail and the remainders limited after it cannot be barred by will: per Lord Redesdale, L.C. (Ir.) *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281 at p. 294; and per Fry, J., *In re Barber's Settled Estates* (1881), 18 Ch. D. 624 at p. 628.

Executory limitation.

An executory limitation over of an estate *pur autre vie* cannot be defeated by a prior taker of a *quasi*-estate in fee simple: *In re Barber's Settled Estates* (1881), 18 Ch. D. 624.

CHAPTER XIX.

USES—ESTATES OF TRUSTEES.

Use, by what Words created: Cestui que Use has Estate limited by Use: Use limited greater than Estate of Grantee to Uses: Limitation in Tail to Uses: Unto and to Use of A.: No Use upon Use: To Use of A., yielding Rent to B.: Where Trustees take Legal Estate: Active and passive Trusts: "Pay to or permit to receive": Legal Estate of Trustees not enlarged or diminished by nature of trusts.

As before mentioned the typical deed at common law ran: "A. grants certain lands to B. habendum to B. and his heirs," but very early there was ingrafted on to B.'s estate a declaration of the uses on which he was to hold the lands. The Statute of Uses, 27 Hen. VIII. (1535) c. 10, turned such uses into seisin.

No special form of words is necessary to create a use. Use, how created.

The authorities for this proposition are: 2nd Instit. 672; *Fox's Case* (1609), 8 Rep. 93 b.; S. C. *sub nom. Smallman* v. *Powys*, 2 Brownl. & G. 291; *Coultman, Coltman*, or *Colton* v. *Senhouse* (1677), T. Jones, 105; Pollexf. 523; 2 Lev. 225; 2 Show. K. B. 11; and see 1 Sanders, Uses, ch. 2, s. 2 (3), p. 95 (5th ed.).

A covenant for value "that A. shall have the manor of B." raises a use, but a covenant to levy a fine to uses does not do so: *Bainton* v. *Reg.* (1554), Dyer, 96 a, pl. 40. Examples: (1) Uses raised.

Fine levied to four, and by indenture between the parties to the fine it was declared that the said fine was levied *eâ intentione* that the conusees should make an estate of the said land to such a person which the conusor should name, with a proviso that the conusees should not be seised to any other use but to that which was specified before, and that the conusees should not encumber the said land. *Held*, that the conusees were seised to their own use until the conusor make nomination, and if he die without any nomination, then the use should vest in his heir: *Bettuan's Case* (1576), 4 Leon. 22.

A. made a feoffment in fee, *sub conditione, eâ intentione* that his wife should have the land for her life, with remainder to his younger son in fee. *Held,* that it was not a condition but an estate which was presently executed according to the intent: *Anon.* (1581), 4 Leon. 2, pl. 3.

Charter of feoffment, Boydell to Thomas and Randoll Crew; and by an indenture of even date between the feoffees and feoffor, after reciting the charter of feoffment, it is witnessed that immediately after the feoffees, their heirs and assigns, had enjoyed the land for 101 years, that then it should be lawful for the feoffor and his heirs to re-enter. The two deeds had several labels which were joined together in one seal. *Held,* that it was the intent of the feoffment that the feoffor should have the land again after the 101 years, and that the intent is the use of the feoffment: *Boydell* v. *Walthall,* (1591) Moore 722.

"If a man covenants for consideration to be seised to the use of himself for life, and after to the use of his son, but he further says, that his meaning is his wife shall have it for her life, this is not a void clause, but good to the wife:" per Periam, J., *Carter* v. *Kungstead* (1591), Ow. 84.

"Forasmuch as the intention of the parties is the creation of uses, if by any clause in the deed it appears that the intent of the parties was to pass it in possession by the common law, there no use shall be raised:" *Fox's Case* (1609), 8 Rep. 93 b at p. 94 a.

Word "use" not essential.

"Now it is not necessary in declaring a use, if there be transmutation of possession, to use the very word *use.* Any expression whereby the mind of the party may be known that such a one shall have the land, is sufficient. . . . Now in this case, here is an agreement between the husband and wife, which, though void as an agreement, yet is good to declare a use. As suppose a man at this day make a bargain and sale, and the deed is not inrolled, or make a charter of feoffment and there is no livery, yet they will be sufficient to declare the use of a fine afterwards levied between the same parties:" per Holt, C.J., *Jones* v. *Morley* (1697), 12 Mod. 159 at pp. 162, 163; 1 Ld. Raym. 287 at p. 290.

"Trust."

Conveyance of land to trustees and their heirs to the use of settlor (a woman), her heirs and assigns till marriage, and after the solemnisation thereof "in trust for the said A. and her assigns for her life for her sole and separate use." *Held,* that the use was executed in the woman: *Williams* v. *Waters* (1845), 14 M. & W. 166.

B., being mortgagee in fee simple of certain lands, and the equity of redemption belonging to A., B. and A. released to H. in

fee by way of mortgage subject to a proviso for redemption in favour of A., with power of sale to H. (the new mortgagee). The deed contained a proviso for quiet enjoyment by A. till default, and a proviso that "if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through, or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or shall otherwise become possessed of the said premises or any part thereof, the same shall from thenceforth be subjected and charged to and with the payment to A., his heirs and assigns, of the annual sum of 40*l.*, and the same shall become recoverable by distress or otherwise upon or out of the mortgaged premises." H. did not execute the deed. H. entered into possession. *Held*, that, though the 40*l.* a year, since it was charged in favour of a person who had no legal estate in the land, was not a rent reserved at common law, still it was well created as a rent by the limitation of a use: *Gilbertson* v. *Richards* (1859), 4 H. & N. 277; (1860), 5 H. & N. 453.

(2) Uses not raised.

Covenant by a father on the marriage of his son not to alienate, but that the lands shall descend to the use of the son and the heirs male of his body. *Held*, no use was created: *Anon.* (1561), 1 Anders. 25, pl. 55; Bendl. & D. 121, pl. 153; Benl. 9, pl. 33; 3 Leon. 6, pl. xviii., where it is stated that the father was *cestui que use* in tail.

A father seised in fee of lands covenanted in consideration of the marriage of his daughter that he would suffer 20*l.* annually to descend, go, and remain to the daughter and her husband and the heirs of their bodies. *Held*, that for want of certainty no use was created: *Anon.* (1582), Moore 122.

Tenant in tail, for considerations sufficient to raise a use, covenanted that after his own death the lands should remain to the use of his son John and the heirs male of his body, and afterwards his wife died and the tenant in tail married again and died; in an action by the widow for dower it was held that no use was raised by the covenant: *Blytheman* v. *Blytheman* (1592), 1 And. 291, ca. ccxcix.; Cro. Eliz. 280.

Covenant by a man seised of land, on the marriage of his son, that the land shall after his death remain and be to his son and his intended wife and the heirs of the son, to the use of the son and his intended wife and to the heirs of the son. *Held*, no use: *Buckley* v. *Simonds* (1622), Winch. 59; S. C. *sub nom. Buckler* v. *Symons*, 22 Viner, p. 211, Uses (O. 4), pl. 1; 2 Roll. Abr. 788.

Covenant, bargain and sale for value (not enrolled) by Margaret

Foster that her eldest son should have certain land. *Held*, that the son took no estate for the deed could not operate by way of use, "for the intent of the parties appears on the face of the deed that it should not operate by way of use, and this is the common rule that a use cannot arise against the intent of the parties, as that is the great director of uses:" *Foster* v. *Foster* (1662), Sidf. 82; 1 Lev. 55; Sir Thos. Raym. 43; 1 Keb. 160, 225, 274.

There was at one time a doctrine that deeds to uses were to be construed differently from common law conveyances: see 1 Sanders, Uses, ch. 2, s. 4, pp. 122 *et seq.* (5th ed.), and the cases there cited; but such doctrine has been long since abandoned; 4 Cruise Dig. tit. xxxii. ch. 19, ss. 62 *et seq.*

Transmutation of use into seisin.

Where a deed contains a declaration of uses, the legal seisin is, under the Statute of Uses, transferred from the grantee to the person who has the use for the estate mentioned in the use.

"Where any person or persons . . . shall happen to be seised of and in any . . . hereditaments to the use, confidence, or trust of any other person or persons . . . in every such case . . . such person and persons that have . . . any such use, confidence, or trust shall from henceforth stand and be seised deemed and adjudged in lawful seisin, estate and possession of and in the same . . . hereditaments . . . of and in such like estates as they had or shall have in use, trust, or confidence of or in the same, and that the estate, right, title and possession that was in such person or persons that . . . shall be seised of any . . . hereditaments to the use, confidence, or trust of any such person or persons . . . be from henceforth clearly deemed or adjudged to be in him or them that . . . hereafter shall have such use, confidence, or trust after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them:" 27 Hen. VIII. (1535), c. 10, s. 1.

The *cestui que use* of course has such estate only as is limited to him under the uses, for the Statute so provides; but further, inasmuch as the use is fed out of the estate of the grantee to uses, it follows that—

Cestui que use cannot have greater estate than grantee.

Where the grantee to uses and *cestui que use* are not the same person, and the estate of the grantee to uses is less than the estate declared by the uses, the latter will

determine with the former: 1 Sand. Uses, ch. 2, s. 2 (5), p. 107 (5th ed.).

"Where an estate is limited to one, and the use to a stranger, there the use shall not be more than the estate out of which it is derived:" *Jenkins* v. *Young* (1631), Cro. Car. 230; Sir Wm. Jones, 253; *Meredith* v. *Joans* (1631), Cro. Car. 244.

Land given to two, habendum to them for the term of their lives and that of the longer liver of them, to the use of A. for the term of his life. *Held*, that the estate of A. determined on the death of the survivor of the two: Shep. Touch. 106; *Anon.* (1560), Dy. 186 a, pl. 1.

If *cestui que use* same as grantee he has the estate limited in the uses.

The rule does not apply where the grantee to uses is also the *cestui que use*.

Gift of land to husband and wife, habendum to husband and wife to the use of them and the heirs of their bodies. *Held*, that they took an estate tail, on the ground that it was not a use executed by the Statute, in which case the estate given by the use could not be more than the estate out of which it was derived, but was a limitation of the estate to them and the heirs of their two bodies, and they were in by the common law: *Jenkins* v. *Young* (1631), Cro. Car. 230; W. Jo. 253, pl. 3; S. C. *sub nom. Meredith* v. *Joans*, Cro. Car. 244; see also *Younge* v. *Dymock* (1631), Dy. 186 a, pl. 1, note.

Limitation in tail to uses.

There is some difference of opinion as to whether, where a limitation is made in tail to uses, the uses will take effect or not.

The learning on this question, which is now of but little importance, will be found in Co. Litt. 19 b; Shep. Touch. 516; Bac. Law Tracts (8vo ed. 1737), p. 347; 1 Sand. Uses, ch. 1, s. 6 (2), p. 28; and ch. 2, s. 2 (1), p. 87 (5th ed.); Jenk. 195; 1 Cruise, 350; 2 Prest. Conv. 265; *Cromwell's Case* (1601), 2 Rep. 69 a at p. 78 a; *Cowper*, *Cooper* or *Carier* v. *Frankline*, *Franklin*, *Franlin*, or *Frankling*, or *Franklin's Case* (1616), 3 Buls. 184; Cro. Jac. 400; 1 Roll. Rep. 332, 384; Moore 848; Godb. 269; Viner, Uses, C., pl. (2), pl. (3). The analogous question as to what is the effect of a covenant by tenant in tail to stand seised to uses is discussed in *Machil*, *Machel* or *Machell* v. *Clerk* or *Clarke* (1702), 7 Mod. 18; 11 Mod. 19; Ld. Raym. 778; Holt, 615; 2 Salk. 619, Com. Rep. 119; and the cases there referred to.

If grantee and *cestui que use* the same person he is in by common

Where in a conveyance at common law to A., uses are declared on A.'s seisin in favour of A. himself, A. is in by the common law, not by the Statute of Uses,

law unless he takes a smaller estate by the uses.

unless the estate declared in A.'s favour by the uses is less than that which A. takes at common law; in which case the uses are executed by the Statute: Sand. Uses, ch. 2, s. 2 (2), pp. 89 *et seq.* (5th ed.); Bac. Law Tracts p. 351 (8vo ed. 1737).

Examples where the estates were the same.

Fine levied with declaration of use to the conusee and his heirs. *Held*, that he was in at common law, not by the Statute: *Long* v. *Buckeridge* (1718), 1 Stra. 106; and per Holt, C.J., *Altham* v. *Anglesey* (1709), Gilb. Eq. 16; S. C. *sub nom. Anglesey* v. *Altham*, 2 Salk. 676.

A., B., and C., being tenants in common in tail, B. released to A. and C. and their heirs his share, habendum to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns. It was admitted that though, if the use had been executed by the Statute, they would have been joint tenants, yet, as they were in at common law, they took as tenants in common: *Doe* d. *Hutchinson* v. *Prestwidge* (1815), 4 M. & S. 178.

M., a tenant in tail in possession of real estate, executed a deed inrolled as a disentailing assurance, by which he granted it to A. and B. and their heirs, free from all his estates tail, to the use of A. and B. and their heirs, in trust for the grantor. A. and B. did not execute the deed, and subsequently executed a disclaimer. *Held*, that the disentailing deed operated at common law, not under the Statute, and therefore was rendered inoperative by the disclaimer: *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17.

A., seised in fee, by indenture grants a rent-charge to "B., C., D., and their heirs," habendum "unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever, as tenants in common and in equal shares." *Held*, that the use being specific, and not inconsistent with the habendum, the whole habendum must be read as specific, and, so read, the deed operated as a grant at common law, not under the Statute of Uses. Grove, J. (at p. 289), said, "If the estate is changed the use is executed by the Statute; if the estate is the same, the grant takes effect by the common law:" *Orme's Case* (1872), L. R. 8 C. P. 281.

Grant "unto and to the use of A. in fee simple," "a conveyance in such a form as this has been repeatedly held to operate at common law and not under the Statute of Uses:" per Stirling, L.J., *Savill Brothers, Limited* v. *Bethell*, [1902] 2 Ch. 523 at p. 540.

Examples where the estates were different.

Feoffment in consideration of a sum paid by the feoffees, habendum to the feoffees and their heirs for ever, to the use of the feoffees for ever; with a clause of warranty to the feoffees, their heirs and assigns *in formâ praedictâ*. *Held*, that they took for life only: *Wilkes* v. *Leuson* (1559), Dy. 169 a, pl. 21.

Release by freeholder to a copyholder "unto the said J. S., habendum unto J. S. and G. S., their heirs and assigns, to the use of J. S. and G. S., their heirs and assigns for ever." *Held*, that though, as G. S. was not named in the premises, he could take nothing in the habendum, yet the use limited to J. S. and G. S. and their heirs is good. *Sammes' Case* (1609), 13 Rep. 54; Ley, 11. And it was said, *Ibid.* at p. 56, "if a man maketh a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the Statute according to the limitation of the uses, divests the estate vested in him by the common law, and executes the same in himself by force of the Statute, and yet the same is out of the words of the Statute of 27 Hen. VIII., which are, where any person, &c., stand or be seised, &c., to the use of any other person; and here he is seised to the use of himself; and the other clause is, where divers and many persons, &c., be jointly seised, &c., to the use of any of them, &c.; and in this case A. is sole seised: but the Statute of 27 Hen. VIII. hath been always beneficially expounded, to satisfy the intention of the parties, which is the direction of the use according to the rule of the law. So if a man, seised of lands in fee simple, by deed covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee; in that case, by the operation of the Statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use:" see also *Watts* v. *Ognell* (1607), Cro. Jac. 192; Noy, 124; *Reading* v. *Norris* (1600), Dy. 200 a, note.

Fine levied to the use of C. and his heirs till a marriage should take effect, and then to the use of the wife, remainder to the use of the conusees and their heirs during the life of C., in trust to preserve contingent remainders, and that they should permit him to receive the profits, then to the use of C.'s first and other sons by a certain wife in tail, then to the use of the heirs male of C.'s body with remainders over. *Held*, that the conusees took by the Statute of Uses, "because the limitation of the use is different from the estate of the land, as where a feoffment is made to the use of the feoffee for life, remainder to J. S., the feoffee is in by the Statute.

Feoffment to A. and his heirs, to the use of A. and B., and his heirs, they are joint tenants; the difference is that where the last fee simple of the use is limited to him who hath the estate in the land, he is in by the common law, as in the case Inst. 22 b, where a feoffment is to the use of the feoffor in tail, and after to the use of the feoffee in fee:" *Tipping* or *Tippin* v. *Cosins, Cosin, Cozens* or *Coson* (1694), Comb. 312; Carth. 272; 4 Mod. 380; Holt, 731; 1 Ld. Raym. 33.

The Statute of Uses only operates to transmute one use into a legal estate. All uses declared upon the first use, other than rents issuing thereout, are equitable estates or trusts.

This proposition is often compendiously, though somewhat inaccurately, expressed in the words—

No use on a use.

> A use cannot be limited on a use: 1 Sand. Uses ch. 2, s. 8 (6), p. 275 (5th ed.).

The proposition is applied even where the first use is in favour of the grantee himself, for although he is in by the common law and not by the Statute, "he is in of the estate clothed with the use, which is not extinguished, but remains in him:" per Bayley, J., *Doe* d. *Lloyd* v. *Passingham* (1827), 6 B. & C. 305 at p. 314; and "they take that seisin to the use of themselves, and not to use of another, in which case alone the use is executed by the Statute:" per Holroyd, J., *Ibid.* at p. 316.

One infeoffed his two sons to the use of himself for life, after to the use of them and their heirs *ad ultimam voluntatem suam perimplendam,* and afterwards devised in fee. *Held,* at law, that the devisee should not have the land, because a use cannot be limited on a use, so that, "when he limits it to the use of his sons and their heirs, he cannot afterwards limit it to the uses of his last will:" *Girland* v. *Sharp* (1595), Cro. Eliz. 382.

By marriage settlement lands were conveyed to trustees and their heirs to the use of them and their heirs to the use of the husband for life, remainder to the use, &c. *Held,* that the use and legal estate were vested in the trustees, and the limitations to the husband, &c., were but trusts: *Lady Whetstone* v. *Saintsbury* (1723), 2 P. Wms. 146.

Conveyance by lease and release to W. and E. and their heirs, habendum unto W. and E., their heirs and assigns, to the use of W. and E., their heirs and assigns, to the uses, &c. *Held,* that W. and E. took the legal estate, and that the uses following gave

equitable interests only: *Doe* d. *Lloyd* v. *Passingham* (1827), 6 B. & C. 305.

No uses under bargains and sales.

Inasmuch as a grantee under a bargain and sale only gets the seisin by virtue of the Statute of Uses, it follows that all uses declared by such an instrument are equitable estates or trusts, the operation of the Statute being exhausted in conferring a legal estate on the bargainee: Shep. Touch. p. 510.

Bargain and sale for value enrolled, "to G., habendum to G. and his heirs, to the use of J. for life, remainder to the use of G. and the heirs of his body, remainder to the use of the heirs of J." *Held*, that the limitation of uses was void at law: *Tyrrel's Case* (1557), 2 Dy. 155 a, pl. 20.

To use of A., yielding rent to B.

Where land is limited to the use of A. and his heirs, yielding a rent to B. and his heirs, the rent is well created by way of use under the Statute: *Lord Cromwell's Case* (1601), 2 Rep. 69 a.

"It is quite true no use in the law can be created after a use. In a conveyance to A. and his heirs to the use of A. and his heirs the Statute operates upon the use and exhausts its operation, and all beneficial estates in the land itself declared upon such a seisin are equitable estates or trusts; but this is not so with a rent, it is a new estate. It is fed out of the seisin of A. and his heirs, and is a legal estate by virtue of the Statute of Uses. It is precisely the same case as a rent declared out of the estate of the bargainee upon a bargain and sale. He is seised by virtue of the Statute, the use of himself is the first use, and any beneficial estate declared upon his seisin is a trust: Shep. Touch. p. 510; but a rent may be declared out of his estate and will not be deemed a use upon a use: Lord St. Leonard's Note to Gilbert on Uses, p. 347"; per Martin, B., *Gilbertson* v. *Richards* (1859), 4 H. & N. 277 at p. 297. The case was affirmed on appeal (1860), 5 H. & N. 453.

The Statute of Uses, moreover, does not transmute all primary uses into legal estates, even if the words *use, confidence or trust*, which are the words used in the Statute of Uses, or any of them, are or is used, for—

Grantees, take legal estate, if they have duties to perform.

> Where the legal estate is vested at Common Law in trustees, on trusts for the benefit of another which require the active performance by them of some duties, such as to pay the rents and profits to another, to pay debts, to keep in repair, or the like, they retain the legal estate; but, on the other hand, if they have no

active duties to perform, but merely to allow another to receive the rents and profits, that other takes the legal estate: see Shep. Touch. 506, 527; Lewin on Trusts, c. 12, s. 1, p. 229 (11th ed.).

Feoffment in fee to the use of the feoffor for life, and after his decease that A. should take the profits; the use is executed in A. But, on the contrary, if he said that after his death the feoffees should receive the profits and pay them to A., the use would not be executed in A., because he could only have the profits by the hands of the feoffees: Bro. Abr., *Feffements al Uses*, 340, pl. 52, citing Y. B. 36 Hen. VIII. (1544), but the case has not been traced.

Conveyance in a marriage settlement to R. and J. and their heirs upon the trusts and for the uses, &c., that is to say, in trust for P. (the intended husband) and his heirs till the marriage, and then in trust to permit and suffer M. (the intended wife) and her assigns during her life, and notwithstanding her coverture, to receive and take the issues and profits thereof to and for her and their own sole and separate use free from the debts, control, and engagements of P., and her receipts alone notwithstanding coverture to be good and sufficient discharges for the same, and after her death in trust for P. and his assigns for life, and after the death of the survivor, in trust for the children of P. by M. as they should appoint. P. and M. appoint to such uses as their son F. should appoint; F. appoints the remainder in fee. *Held*, on ejectment after the deaths of P. and M., that all the estates of the beneficiaries under the settlement, with the possible exception of that of M., were legal: *Nash* v. *Ash* (1862), 1 H. & C. 160.

Limitations to separate use of married woman.

In the case last cited it was not necessary to determine the nature of the estate of the wife, but the following case shows the distinction between a mere trust for the separate use of a married woman during her life, which gives her the legal estate, and a trust to pay the rents to her for her separate use during her life, which leaves the legal estate in the trustees.

Conveyance by settlement (lease and release) on marriage to trustees and their heirs to the use of A., the intended wife, her heirs and assigns till the marriage, and afterwards in trust for A. and her assigns during her life, for her own sole and separate use independent of the intended husband, his debts, control, and engagements, with remainders over. *Held*, that the wife took the legal estate. Parke, B., said, "We cannot collect clearly, from the words of the deed, that they intended to give the trustees an *active*

trust, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife although the husband is a trustee for her in equity:" *Williams* v. *Waters* (1845), 14 M. & W. 166, at p. 173. See the remarks on this case in Williams on Settlements, 53.

"Pay to *or* permit to receive."

There does not seem to be any case on a deed where the trust was "to pay unto A. *or* permit and suffer A. to receive" the rents. In *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109, where these words occurred in a will, it was held that they gave the legal estate to the *cestui que trust*, on the ground that the words "permit and suffer" followed the words "to pay unto," and that where there is a repugnancy, the first words in a deed, and the last words in a will, prevail. See also *Baker* v. *White* (1875), L. R. 20 Eq. 166; and *Re Adams and Perry's Contract*, [1899] 1 Ch. 554. If this reasoning holds good, these words occurring in a deed would leave the legal estate in the trustees.

"Where the trust is 'to pay unto or permit and suffer a person to receive' the rents, as the former words would create a special trust and the latter would be construed a use executed by the statute, the Court holds, for want of a better reason, that the former or latter words shall prevail, as the instrument in which they are found happens to be a deed or a will:" Lewin on Trusts, c. 12, s. 1 (7), p. 231 (11th ed.). But all the cases cited are cases on wills.

Legal estate of trustees not enlarged or diminished by nature of trusts.

The legal estate limited to trustees will not be enlarged or diminished by the circumstance that the nature of the trusts requires a larger, or would be satisfied by a smaller, estate.

The uses of a fine were declared to be to the use of S. for life, remainder to the use of L. and E. and their heirs during the life of S., in trust to support contingent remainders, remainder to the use of H. for life, remainder to the use of L. and E. and their heirs, in trust to support contingent remainders, with remainders over in tail, with remainder to such uses as H. should appoint. *Held*, that the second limitation to L. and E. gave them an estate in fee simple: *Venables* v. *Morris* (1797), 7 T. R. 342, 438; and see the remarks of Lord Kenyon, C.J., in *Doe* d. *Lee Compere* v. *Hicks* (1797), 7 T. R. 433 at p. 437, where he says that it was necessary

that the fee should be in the trustees so as to support any contingent remainders limited under the power; and Sir William Grant, in *Curtis* v. *Price* (1805), 12 Ves. 89 at p. 100, seems to have adopted the same view, but "in *Wykham* v. *Wykham* (1811), 18 Ves. 395 at p. 422, Lord Eldon scarcely seems to agree with Sir William Grant in that view of *Venables* v. *Morris*" per Wood, V.-C., *Lewis* v. *Rees* (1856), 3 K. & J. 132 at p. 139, and see p. 142.

The uses of a recovery were declared to be to the use of trustees, their heirs and assigns, during the life of S., in trust to pay the rents as she should, notwithstanding coverture, appoint, with remainder to the use of her children as she should appoint. and in default to the use of the children as tenants in common in tail with cross remainders. *Held*, that the estate *pur autre vie* of the trustees could not be considered as commensurate with the limitations of the settlement. Heath, J., said, "There is a distinction between limitations by settlement and limitations by will; in the latter case they are construed according to the intention of the testator, and then the trustees, under a limitation of this sort, might be considered as having an estate commensurate with the subsequent limitations; but that mode of construction cannot be applied to a limitation by settlement:" *Blaker* v. *Anscombe* (1804), 1 Bos. & Pul. N. R. 25.

Power in a will for tenants for life to appoint to trustees, upon trust to raise and pay a jointure. The tenant for life by deed appointed to trustees to hold to them and their heirs, upon trust to raise and pay the jointure. The Court of King's Bench certified, on a case sent from Chancery, that the trustees took an estate in fee simple: *Wykham* v. *Wykham* (1809), 11 East, 458. The Court of Common Pleas was of opinion that the trustees took no estate: *Wykham* v. *Wykham* (1810), 3 Taunt. 316. *Held*, by the Court of Chancery, that they took an estate in fee simple: *Wykham* v. *Wykham* (1811), 18 Ves. 395. Lord Eldon, C., said (at p. 420), "If you look to the executing instrument itself, it purports to be a grant in fee; and it is a deed. It purports to be a grant in fee for purposes certainly not requiring a fee, but still it purports to be a grant in fee; and it is, I think, difficult to maintain that, if a man does more, by using words which have a legal effect, than is necessary to execute the purpose he professes to execute, the circumstance that he uses those words of larger legal effect than is required, and his purpose, shall cut down the legal effect of the words in a deed."

Conveyance in marriage settlement to B. and his heirs, to the uses following, that is to say, to the use of C. for life, remainder

to the use of his widow for life, remainder (in the events that happened) to the use of B., his heirs and assigns, on trust to take the rents and pay them to M. for life for her separate use, remainder as M. shall by will appoint; in default to the use of the heirs and assigns of M. *Held*, that nothing in the deed cut down the legal estate in fee given to B.: *Cooper* v. *Kynock* (1872), L. R. 7 Ch. 398.

Exception.

To the last stated rule, however, there is one exception, viz.:—

Limitation to trustees and their heirs cut down by limitation to them of term.

> Where there is a limitation to trustees and their heirs generally, and the object of that limitation ceases with the life of the tenant for life, and there is a subsequent limitation to the same trustees of a term, inasmuch as they cannot take the term if they take an estate in fee simple absolute by the former limitation, such limitation will be cut down to an estate *pur autre vie.*

Examples.

Conveyance to P. and J. and their heirs, to the use of M. for life, remainder to the use of E. if she continued unmarried, but if she should marry, to the use of P. and J. and their heirs, on trust out of the rents to pay an annuity to E. during her life, and with the rest of the rents and profits to maintain the children of M. and E., remainder after the several deceases of M. and E., to the use of P. and J., their executors, &c., for 100 years, remainders over. *Held*, that the estate in fee in P. and J. must be cut down to an estate during the life of E., as the subsequent limitation of a term to them was inconsistent with their taking an estate in fee simple absolute: *Curtis* v. *Price* (1805), 12 Ves. 89 (see per Wood, V.-C., *Lewis* v. *Rees* (1856), 3 K. & J. 132 at pp. 145, 148).

Limitation to the use of W. for life, remainder to the use of N. and B. and their heirs, on trust to preserve, remainder to the use of R. for life, remainder to the use of N. and B., their executors, &c., for the term of 500 years, remainder to the use of J. for life, remainder to the use of N. and B. and their heirs during the life of J., with remainders over. *Held*, that the estate limited to the trustees in fee must be cut down to an estate *pur autre vie*, during the life of W.: *Beaumont* v. *Marquis of Salisbury* (1854), 19 Beav. 198.

"Trustees and their heirs" to preserve.

An attempt has been made to extend this exception to all cases where there is a limitation to trustees and their heirs generally on trust to preserve contingent remainders and in a subsequent part

of the deed there is any other limitation to the same trustees; but such attempt has not prevailed, apparently on the ground that there is no such inconsistency in repeating the limitation of an estate in fee simple as to render it clear that the words could not bear their ordinary meaning: *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605; *Lewis* v. *Rees* (1856), 3 K. & J. 132.

CHAPTER XX.

RESULTING USES AND TRUSTS—ESTATES BY IMPLICATION.

Reversion in Grantor: Resulting Uses to Grantor: Difference between Limitations in Remainder to Heirs Special and to Heirs General of Grantor: Resulting Trusts: No resulting Use or Trust for Person other than Grantor: Cross Remainders not implied: "Share": "Survivors" read "others."

"By the rules of the common law applicable to deeds, no intention will be presumed unless it is expressed: and consequently no estate will arise unless there be a limitation to pass that estate": 1 Preston, Est. 190, citing *Gardner* v. *Sheldon* (1672), Vaugh. 259 at p. 261; and per Twysden, J., *Pybus* v. *Mitford* (1673), 2 Lev. 75 at p. 79.

Reversion in grantor.

Where A., seised in fee, creates a particular estate by a conveyance operating at common law, the reversion of the fee simple remains in A.: Co. Litt. 22 b.

On conveyance of fee no resulting use to grantor, if consideration given, but resulting use to grantor if no consideration given, except so far as uses declared.

Where A., seised in fee, conveys the whole fee simple by a conveyance operating at common law, for a good or valuable consideration, there is no resulting use to A., even if no uses are declared; but where A. conveys the whole fee simple by a conveyance operating at common law, without consideration, there is a resulting use to him in fee simple, unless uses are declared: *Beckwith's Case* (1589), 2 Rep. 56 b at p. 58 a; Moore 196; *Armstrong* d. *Neve* v. *Wolsey* (1755), 2 Wils. 19.

The latter part of this rule was different as to a conveyance before the Statute of *Quia Emptores*, 18 Edw. I. (1289) c. 1: *Villers* v. *Beamont* (1556), Dyer, 146 a at p. 146 b, pl. 71; and is different as to a conveyance in tail or for life at any time, as the tenancy created, formed prior to that Statute with regard to the fee, and still forms with regard to the particular estate, a sufficient consideration: Shep. Touch. 522; Vin. Abr. tit. Uses, F. 5 and 6 vol. 22, p. 188; *Villers* v. *Beamont* (1556), Dyer 146 a at p. 146 b pl. 71.

Nominal consideration.

A nominal consideration is sufficient to prevent a resulting use: *Porter's Case* (1592), 1 Rep. 22 b at p. 24 a.

The consideration in a lease is sufficient to support the release: *Shortridge* v. *Lamplugh* (1702), Holt, 621; 2 Salk. 678; 3 Salk. 387; 2 Ld. Raym. 798; 7 Mod. 71.

Resulting use to grantor of uses not disposed of.

> Where A. conveys the whole fee simple by a conveyance operating at common law, whether there is consideration or not, and uses are declared which do not exhaust the fee or fail, there is a resulting use to A. of so much of the estate as the uses do not dispose of effectually: Co. Litt. 23 a, 271 a, b; Fearne, C. R. 41, 42; *Audley's Case* (1559), Dyer, 166 a; 4 Leon. 166, 210; *Woodliff* v. *Drury* (1594), Cro. Eliz. 439.

If the grantor is seised *ex parte maternâ*, the resulting use is of the same nature: Shep. Touch. 522; Y. B. 5 Edw. IV. (1465), 7, pl. 16, cited in *Beckwith's Case* (1589), 2 Rep. 56 b at p. 58 a, and in *Chudleigh's Case* (1588–95), 1 Rep. 120 a at p. 127 a, b.

If use disclaimed.

If the *cestui que use* of a particular estate disclaims, the remainders are accelerated, unless the uses arise on a covenant to stand seised, when there is a resulting use to the covenantor: *Lord Paget's Case* (1591), 1 And. 259, 263; Moore 193; 1 Leon. 194, cited in the *Rector of Chedington's Case* (1598), 1 Rep. 153 a at p. 154 a, b.

The text is taken from Coke, who cites *Lord Paget's Case* as his authority, but the report in Anderson is not to the same effect as, and the report in Moore is directly contrary to, the citation. It is impossible to discover from the report in Leonard what the decision was.

One particular instance of the foregoing rule is of sufficient importance, having regard to the rule in *Shelley's Case*, to be stated in the rule following:—

Resulting use to grantor for life.

> "Where a use is limited which cannot commence till after the grantor's decease, and either no use is limited to take effect in the grantor's lifetime, or, uses being limited, they are not commensurate with the grantor's life, the freehold will result to him, unless an express use be limited to him inconsistent with such an implication:" Butler's note to Fearne, C. R. 41.

The rule is so fully discussed in Fearne, C. R. 41 *et seq.*, that it is unnecessary to discuss it here. The cases cited by Fearne are: *Pibus, Pybus* or *Bipus* v. *Mitford* or *Milford* (1674), 1 Vent. 372; 2 Lev. 75; 1 Mod. 98, 121, 159; 3 Keb. 129, 239, 316, 338; Sir Thos. Raym. 228; Freem. K. B. 351, 369; *Penhay* v. *Hurrell* (1699), 2 Vern. 370; 2 Freem. 213, 231, 235, 258; *Adams* v. *Tertenants of Savage* (1703), 2 Salk. 679; 2 Ld. Raym. 854; *Rawley* v. *Holland* (1712), 22 Vin. Ab. 189, pl. 11; 2 Eq. Ca. Ab. 753; *Tippin* or *Tipping* v. *Cosin, Coson, Cosins,* or *Cozens* (1693), Carth. 272; 4 Mod. 380; Holt, 731; Comb. 312; 1 Ld. Raym. 33; *Else* or *Elie* v. *Osborn* (1717), 1 P. Wms. 387; 2 Vern. 754; *Southcot, Southcote* or *Southcott* v. *Stowell* or *Stowel* (1676), 1 Mod. 226, 237; 2 Mod. 207; Freem. K. B. 216, 225; 3 Keb. 704; *Wills* v. *Palmer* (1770), 5 Burr. 2615; 2 Wm. Bl. 687. Mr. Fearne adds that this rule flows from the rule laid down by Coke (Co. Litt. 23 a), that in a conveyance to uses without valuable consideration so much of the use as is undisposed of results to the grantor.

There is some difficulty in seeing what becomes of the freehold in cases like *Bedford* v. *Russell,* or *The Earl of Bedford's Case* (1592), Pop. 3; Moore, 718; 2 Anders. 197; cited in *Chudleigh's Case* (1589–95), 1 Rep. 120 a at p. 130 a; *Godbold* v. *Freestone* (1694), 3 Lev. 406; *Adams* v. *Tertenants of Savage* (1703), 2 Salk. 679; 2 Ld. Raym. 854; *Rawley* v. *Holland* (1712), 22 Vin. 189, pl. 11; 2 Eq. Ca. Ab. 753, where the first use was to the grantor himself for ninety-nine years, and it was held that there was no resulting use to him, notwithstanding that the use was not limited away from him during all his life. See 1 Law Quar. Review p. 412.

Only applies where grantor seised in fee.

The rule is stated as laid down in the notes to Fearne, but it should be observed that it is only true if the grantor be seised in fee, and that if he be tenant for life, the use undisposed of will not result to him: *Castle* v. *Dod* (1607), Cro. Jac. 200, where it is stated that the fact that the grantee becomes liable to the ancient rent and forfeiture is sufficient consideration to vest the use in him.

But if a tenant *pur autre vie* conveys his estate to trustees upon trusts which fail, there is a resulting trust for him and the original special occupant, if any: *Northen* v. *Carnegie* (1859), 4 Drew. 587.

Difference between remainder to heirs general and heirs special of grantor.

In connection with this subject, Fearne points out (C. R. 51) the difference "between a subsequent limitation to the use of the heirs special and one to the use of the heirs general, in cases where the freehold is limited away from the grantor during his life; the latter . . . leaves the old use in himself by way of reversion" (it

would be otherwise in limitations contained in deeds after 1833: 3 & 4 Will. IV. (1834) c. 106, s. 3), "but the former is a contingent remainder to his heirs special—that is, where the limitation is by way of use; for by a conveyance at common law the limitation to the heirs special of the grantor would be void; because a donor cannot make his own heir a purchaser, even of an estate tail, without departing with the whole fee."

Resulting trusts of property vested in trustees.

Where a declaration of the trusts of property vested in trustees does not exhaust all the interest vested in them, there is a resulting trust of the undisposed of interest to the settlor.

The authorities for this proposition are: *Langham* v. *Nenny* (1797), 3 Ves. 467; *Campbell* v. *Prescott* (1808), 15 Ves. 500; *Hawkins* v. *Hawkins* (1834), 7 Sim. 173; *Wilson* v. *Paul* (1836), 7 Sim. 620; *Pringle* v. *Pringle* (1856), 22 Beav. 631; *Anon.* (1858), 1 Giff. 392; *Wollaston* v. *Berkeley* (1876), 2 Ch. D. 213; *Upton* v. *Brown* (1879), 12 Ch. D. 872; *Mara* v. *Browne*, [1895] 2 Ch. 69.

Where, however, funds were settled upon trust for the wife for life, and after her death for the husband until bankruptcy, alienation or death, which should first happen, and after the decease of the survivor of the wife and husband, for the children; the husband became a liquidating debtor in the wife's life; the wife subsequently died; it was held that the income of the fund between the wife's death and the husband's death belonged to the children. None of the cases on deeds was referred to: *Re Akeroyd's Settlement*, *Roberts* v. *Akeroyd*, [1893] 3 Ch. 363.

Whether results as realty or personalty.

If the interests which are undisposed of are interests in the proceeds of sale of land directed to be sold by the deed, the settlor takes such interests as personalty and not as land, even if the sale is not to be made during his life: *Hewitt* v. *Wright* (1780), 1 Bro. C. C. 86; *Clarke* v. *Franklin* (1858), 4 K. & J. 257; but if all the purposes of the deed fail, the land itself results to the settlor as land: per Lord Eldon, C., *Ripley* v. *Waterworth* (1802), 7 Ves. 425 at p. 435; per Wood, V.-C., *Clarke* v. *Franklin* (1858), 4 K. & J. 257 at p. 265.

Where land is settled upon trust for sale (either with or without a power to postpone), and to invest the proceeds and pay the income to one for life with remainders over, and no direction is given as to the application of the rents until sale, the tenant for life is entitled to such rents, though more than 4 per cent. upon the purchase-money: *Hope* v. *D'Hedouville*, [1893] 2 Ch. 361; *Re Searle*, *Searle* v. *Barker*, [1900] 2 Ch. 829.

No estate or trust can arise by implication of law, and no estate or trust by way of resulting use or trust can arise in favour of a person who was not the owner of the property conveyed by the deed: Fearne, C. R. 49.

Resulting use in favour of grantor only.

Fearne cites *Davies* v. *Speed* (1692), 2 Salk. 675; 4 Mod. 153; 12 Mod. 38; Carth. 262; Show. P. C. 104; Skin. 351; Holt, 730, where a husband and wife, having joined in a fine of the wife's lands to the use of the heirs of the body of the husband begotten on the wife, and for want of such issue, to the use of the right heirs of the husband, Holt, C.J., said, "There can be no estate for life to the husband by implication, but the estate is the wife's, to which he is a stranger:" *Sir Thomas Tipping's Case* (1711), cited 1 P. Wms. 359 (reported *sub nom. Tipping* v. *Pigott*, Gilb. 34; 1 Eq. Ca. Ab. 385, pl. 2); and some cases of devises.

The rule applies to equitable interests in personalty: *Pringle* v. *Pringle* (1856), 22 Beav. 631.

In some of the cases relating to resulting uses and resulting trusts of personalty, the resulting uses and trusts are spoken of as implied uses and trusts, but it is obvious that such expressions are only loose and inaccurate definitions of resulting uses and trusts.

Funds deemed settled by wife.

When a father covenants in his daughter's marriage settlement to pay a sum as her portion, it is considered to be settled by *her*, so that any interest undisposed of results to her: *Ward* v. *Dyas* (1835), Ll. & Goo. tem. Sug. 177; *Dennehy* v. *Delany* (1876), Ir. R. 10 Eq. 377; unless a contrary intention appears: *Re Nash* (1882), 51 L. J. Ch. 511; 30 W. R. 406; 46 L. T. 97.

By a marriage settlement the wife's father declared trusts of personalty for her *during coverture*, but no trusts were declared in the event of her surviving her husband during the residue of her lifetime. *Held*, that she took a life interest in the fund: *Allin* v. *Crawshay* (1851), 9 Hare, 382; 21 L. J. Ch. 873.

Cross limitations are never implied.

Cross-remainders cannot be implied in a deed; an express declaration of intention is ineffective without apt words of limitation.

"In the case of a deed, cross-remainders cannot be implied. That rule, which was established in *Cole* v. *Levingston* ((1672), 1 Vent. 224; 2 Keb. 700, 856; 3 Keb. 2, where the limitations are stated; 3 Keb. 35, 83), has never been departed from since, and

we should be removing the landmarks of real property if we were to bring that rule into question:" per Lord Kenyon, C.J., *Doe* d. *Tanner* v. *Dorvell* (1794), 5 T. R. 518 at p. 521.

See also note to *Cook* v. *Gerrard* (1668), 1 Wms. Saund. at p. 186 a (ed. 1871, vol. 1, pp. 179 *et seq.*).

"Of the general rule" [that cross-remainders cannot be implied in a deed] "there is no doubt. . . . The rule, when correctly understood, is in truth only a branch of the general rule, that no estate of inheritance can be created by deed without apt words indicating the estate to be taken; that is, 'heirs' to create an estate in fee, 'heirs of the body' to create an estate tail. When lands are conveyed by lease and release, or other assurance, to the use of A. and B., as tenants in common, and the heirs of their respective bodies, A. and B. have estates tail, each in his own undivided moiety; but it is clear that neither of them has any estate tail whatever in the other's moiety. Let us suppose, in order to put the case as strongly as possible in favour of cross-remainders, that the deed conveying the land should contain a clause expressly stating the intent of the parties to be, that, in case A. or B. should die without heirs of his body, his moiety should go over to the other, by way of cross-remainder in tail. Then, supposing these to be the very words used, there could be no doubt as to what the parties intended; but it is certain that, in the event of A. or B. dying without issue, the intention could not be carried into effect for want of the words 'heirs of the body,' connected with the gift over by way of cross-remainder; and as this cannot be done by any words except the words 'heirs of the body,' however clearly the language may show the intention of the parties, so *à fortiori* the object cannot be effected by any inference of intention, however clearly it may arise from the context:" per Pollock, C.B., *Doe* d. *Clift* v. *Birkhead* (1849), 4 Exch. 110 at p. 124. It will be remembered that in deeds executed since 1881 the words "in tail" are sufficient to create an estate tail: Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. 41) s. 51.

Examples.

Limitation to the use of A. and B. and of the heirs males of the bodies of the said A. and B. lawfully to be begotten, and for default of such issue male of the body of either of them, then to the use of either of them having issue male of his body lawfully begotten, and for default of such issue male of both the bodies of the said A. and B. or either of them lawfully to be begotten, over. *Held*, that there were no cross-remainders: *Nevill* v. *Nevill* (1617), 1 Brownl. & G. 152; 1 Roll. Abr. 837 (R.), pl. 2.

Limitation to the use of all and every the daughter and daughters of the body of C. on the body of M. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, and for default of such issue, over. *Held*, that there were no cross-remainders: *Doe* d. *Foquett* v. *Worsley* (1801), 1 East, 416.

Limitation "to the use of all and every the child and children of the said intended marriage, both sons and daughters equally part and share alike, if more than one as tenants in common and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years without issue of his or their body or bodies lawfully issuing, then and so often, and as to the part and share, parts and shares, of all and every such child and children so dying, to the use of the survivors of such children equally part and share alike, if more than one, as tenants in common and not as joint tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, until every such child and children shall be dead without lawful issue of their each and every of their bodies lawfully issuing; and in case there shall be but one child only of the said intended marriage, or one only surviving child thereof, then to the use of such only or only surviving child of the said intended marriage, be the same a son or a daughter, and of the heirs of the body of such only or only surviving child; and for default of such issue, or in case there should be issue of the said intended marriage who should all die without issue of his or their body or bodies lawfully issuing, under the said age of one-and-twenty years, then" over. There were two children, both of whom attained twenty-one. *Held*, that there were no cross-remainders in this event: *Levin* v. *Weatherall* (1819), 1 Brod. & Bing. 401; 4 J. B. Moore, 116; to the same effect is *Meyrick* v. *Whishaw* (1819), 2 B. & Ald. 810.

Limitation of leaseholds for lives "to the use of all and every the child and children of A. lawfully begotten or to be begotten, and if more than one, equally to be divided amongst them, share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and if there shall be but one such child, then to the use of such only

child and the heirs of his or her body lawfully issuing; and in default of such issue to the use of the heirs of A. *Held*, that on the death of a child without issue and without having made any disposition, his share went to the heir of A.: *Bainton* v. *Bainton* (1865), 34 Beav. 563.

Cross-remainders of accrued shares.

But if cross-remainders are well created as to the original shares, the word "share" will be held to extend to any accrued share. Where the limitation was "to the use of all and every the child and children of the body of A. on the body of B. lawfully begotten or to be begotten, equally to be divided between or among them, if more than one, share and share alike as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and if there should be a failure of issue of the body or bodies of any such child or children, then as to the part or share, or parts or shares, of such child or children, whose issue should so fail, to the use of the remaining and other children of the body of A. on the body of B. lawfully begotten or to be begotten, equally to be divided between or amongst them if more than one, share and share alike, and they to take as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of such remaining and other children lawfully issuing; and in case there should be a failure of issue of the bodies of all such children but one, or if there should be but one such child, then to the use of such only remaining or only child, and the heirs of his or her body lawfully issuing;" and for default of such issue, over. It was held that, though cross-remainders were well created as to the original shares, they were not created as to the accruing shares: *Edwards* v. *Alliston* (1827), 4 Russ. 78; but this case is overruled by *Doe* d. *Clift* v. *Birkhead*, where the limitation was to the use of all and every the children of a marriage, "to be equally divided between them share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the bodies of all and every such children lawfully issuing; and in case one or more of such children should happen to die without issue of his, her, or their body or bodies, then, as to the share or shares of him, her, or them so dying without issue, to the use of the survivors or others of them, share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of their bodies lawfully issuing; and in case all such children should happen to die without issue, or if there should be but one such child, then to the

use of such surviving or only child, and of the heirs of his or her body lawfully issuing," and for default of such issue, over. The question was, to what interests the words of limitation applied; in other words, what was meant by the words "share or shares"; whether they applied to the accruing as well as to the original shares. It was decided that "the word 'share,' according to its natural and obvious meaning, includes, or at all events, if the context requires it, may include, every interest which the child takes under the limitations of the settlement:" *Doe* d. *Clift* v. *Birkhead* (1849), 4 Exch. 110.

A similar meaning was given to the word "share" in *Re Hutchinson's Settlement* (1852), 5 De G. & Sm. 681; 17 Jur. 59.

Executory instruments.

In executory instruments cross-remainders may be implied: *West* v. *Errissey* (1727), 2 P. Wms. 349; 1 Bro. P. C. 225; *Phillips* v. *James* (1865), 2 Dr. & Sm. 404, affirmed (*diss.* Knight-Bruce, L.J.), 3 De G. J. & S. 72.

"Survivors" read "others."

> Where there is a limitation to several, or to a class, as tenants in common in tail (or tail male) with remainder, as to the share of each, to the "survivors," in tail (or tail male), and there is a gift over on failure of issue (or issue male) of all the donees in tail, the word "survivors" will be construed "others."

Limitation to the use of the child or children of A. as tenants in common if more than one and the heirs of their several bodies issuing; "and in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue should be and remain to the use of the surviving child or children of the said A., and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue, till there should be only one child left; and in case all the said children should die without issue, or if the said A. should have no issue of her body," over. There were three children, John, Mary, and Robert. Mary married and died, leaving issue W. and two other children. John died without issue, and without having disposed of his share. *Held*, that John's share vested in W. and Robert, as tenants in common.

"Here the single question arises on the meaning of the word 'surviving,' which, indeed, is the only word that distresses the case. But, taking the whole context together, I do not think that

that word renders the case doubtful. The fair construction of that word, standing in this context, is that on the death of one child without issue, that portion shall go to the surviving line of heirs, and not merely to one child surviving; it must go to the surviving children in their own persons if living, or, if dead, to their issues. And in putting this construction, I do not think we proceed on conjecture merely; for the conclusion of this sentence is, 'And in case all the said children should die without issue,' then the remainder is limited to R. Abell in fee. We cannot give effect to the word 'all' without determining that there must be cross-remainders, not only as long as the individual children, but as long as the several lines of those children exist:" per Lord Kenyon, C.J., *Doe* d. *Watts* v. *Wainwright* (1793), 5 T. R. 427 at p. 431; *Cole* v. *Sewell* (1848), 2 H. L. C. 186; 5 Ir. Law Rep. 190; 6 Ir. Eq. Rep. 66; 2 Con. & L. 344; 4 Dr. & War. 1.

Personalty.

The same rule has been applied to trusts of personalty in shares for several for life, with remainders to their respective children absolutely with a gift over of the share of any of them who died without children to the survivors and their children, with an ultimate gift over of the whole in default of any of them having children: *Re Palmer's Settlement* (1875), 19 Eq. 321.

"Shall die" extended to "are now dead."

A gift over of the shares of persons dying in the lifetime of a tenant for life was extended to the shares of persons dead at the date of the deed in the case of *Barnes* v. *Jennings* (1866), L. R. 2 Eq. 448: where the trusts of a voluntary settlement were for the settlor for life, and after his death for A., B., C., and D., in equal shares, with a proviso that if any of them "should die in the lifetime" of the settlor their shares should go to their issue, or if no issue should accrue to the other shares, and it was held that the gift over applied to the shares of A. and B., who were dead at the date of the deed.

CHAPTER XXI.

REMOTENESS AND PERPETUITY.

Freehold Estates in futuro, other than Remainders, are Void at Common Law: After Life Estate to Unborn Parent No Estate to his Children: Rule against Perpetuities: How applied to Execution of Powers: Indefinite Powers of Sale: Whether Rule applies to Legal Contingent Remainders: Limitations to be construed as Remainders if possible: Personal Covenants: Statutory Grants or Trusts: Exceptions to Rule: Grants to Fluctuating Bodies Void: Except by Crown: Charitable Trusts.

ALTHOUGH the rules relating to remoteness and perpetuity are strictly speaking not rules of interpretation, but rules of law, it seems advisable to state them in this work. Most of the rules relate also to wills, on which nearly all the cases have arisen, and no attempt has been made to collect the cases, but many of those arising on deeds are mentioned.

The rules are of two classes; one relating to limitations at common law, the other to limitations under the Statute of Uses.

The main common law rule is:—

Limitations creating future estates of freehold, other than remainders, are void.

> Any limitation, by which an estate of freehold in corporeal hereditaments, purports to be so granted as to commence, either upon the expiration of a fixed interval of time after the execution of the assurance, or upon the happening of some future contingency, other than the determination of a precedent estate of freehold, is void in its inception.

The authorities are: *Bullock* v. *Burdett* (1567), Dyer 281 a; Moore, 81; *Boraston's Case* (1587), 3 Rep. 19 at 21 a; *Hogg* v. *Cross* (1591), Cro. Eliz. 254; *Buckler's Case* (1597), 2 Rep. 55; *Barwick's Case* (1597), 5 Rep. 93 at 94 b; *Roe* v. *Tranmarr* (1758), Willes, 682; *sub nom. Roe* v. *Tranmer*, 2 Wils. 75; *Savill Bros. Ltd.* v. *Bethell*, [1902] 2 Ch. 523 at 540; 10 Vin. Abr. 206,

Estate, B. pl. 10; *Ibid.* 208, pl. 26; Plowden, 156, *arguendo;* 2 Bl. Com. 165; 1 Prest. Est. 217; Challis, R. P. (2nd ed.) 93.

No freehold *in futuro.*

This rule is often (inaccurately) expressed as follows:—"No freehold *in futuro* can be created."

Contrà under Statute of Uses.

This rule does not apply to limitations under the Statute of Uses. Thus the ordinary shifting uses in a settlement, which shift the property to a younger son and his issue on an elder son or his issue becoming entitled to other property, are good under the Statute of Uses, though they are altogether invalid at common law: *Buckhurst Peerage Case* (1876), 2 Ap. Ca. 1; *per* Ld. Cairns, C., at p. 27; *per* Ld. Chelmsford at p. 33; and *per* Ld. O'Hagan at p. 38.

Any limitation similar to that mentioned above, of an estate of freehold derived out of a remainder or reversion expectant upon a particular estate of freehold, is likewise void in its inception: *Buckler's Case* (1597), 2 Rep. 55; *Barwick's Case* (1597), 5 Rep. 93 at 94 b; *Swift* v. *Eyres* (1639), Cro. Car. 546; 10 Vin. Abr. 206; Estate, B. pl. 9; 1 Prest. Est. 219; Challis, R. P. (2nd ed.) 100.

Incorporeal hereditaments *in esse.*

Any similar limitation of an estate of freehold in any incorporeal hereditament already *in esse* at the time of the limitation is void in its inception: 1 Prest. Est. 217; Challis, R. P. (2nd ed.) 101.

Incorporeal hereditaments created *de novo.*

Limitations of incorporeal hereditaments *de novo* are not within the rule: *Case of Sutton's Hospital* (1613), 10 Rep. 23 at 27 b; Plowd. 156, *arguendo;* Challis, R. P. (2nd ed.), p. 102.

No estates at intervals.

No estate of freehold, whether in corporeal hereditaments or incorporeal hereditaments already *in esse*, can be limited, or caused to exist at intervals only, and not continuously: *Corbet's Case* (1600), 1 Rep. 83 at 87 a, b; *The Prince's Case* (1605), 8 Rep. 14 at 17 a; Challis, R. P. (2nd ed.), 102.

Leasehold interests.

A leasehold interest to commence *in futuro* can be created: such an interest, until the lessee goes into possession under the lease, is called an *interesse termini:* Co. Litt. 345 a; Com. Dig. tit. Estate, G. 14; per Bayley, J., *Doe* d. *Rawlings* v. *Walker* (1826), 5 B. & C. 111 at p. 118.

A further common law rule is:—

Limitation to unborn person for life, remainder to his issue, the remainder is void.

> No estate in corporeal or incorporeal hereditaments can be limited after an estate for life to an unborn person to his child or children: *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; (1890) 44 Ch. D. 85, where all the cases are collected and discussed.

This rule applies to limitations under the Statute of Uses; *Whitby* v. *Mitchell, ubi sup.;* but is applicable to real estate only,

and has no reference to personalty: *Re Bowles, Amedroz* v. *Bowles*, [1902] 2 Ch. 650.

The rule relating to executory limitations arising under the Statute of Uses and to trusts may be stated as follows:—

Rule against perpetuities.

> An executory limitation or trust must take effect, if it takes effect at all, within a life or any number of lives in being at the date of the assurance and twenty-one years after the dropping of the life or the last of the lives.

Child *en ventre.*

A person *en ventre sa mère* is a life in being within the meaning of this rule, for ascertaining both the lives during which the vesting may be postponed, and the person in whom the limitation must vest.

Twenty-one years.

The twenty-one years is a term in gross, and need have no reference to infancy: *Cole* v. *Sewell* (1848), 2 H. L. C. 186 at p. 233.

Nothing barrable is too remote.

No limitation, to take effect on the determination or in defeasance of an estate tail, can be too remote if it can be barred: Co. Litt. 271 b, n. (1), V.; *Cole* v. *Sewell* (1848), 2 H. L. C. 186 at pp. 226, 234.

But limitations or trusts not barrable by a tenant in tail, as, *e.g.*, trusts in a term preceding the limitation of the estate tail, may be too remote: *Lord Southampton* v. *Marquis of Hertford* (1813), 2 Ves. & B. 54; *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115.

Settlement on husband and wife for lives, remainder to sons in tail *male*, remainder to daughters in tail, remainder to survivor of husband and wife in fee, with power to wife, if the husband survived and all the children of the marriage died *without issue*, to charge the estate with 5,000*l.* There was one child of the marriage, a son, who died under twenty-one without issue. *Held*, that the power was too remote: *Bristow* v. *Boothby* (1826), 2 S. & Stu. 465; affirmed on appeal, as appears from *Ellicombe* v. *Gompertz* (1837), 3 My. & Cr. 127 at p. 151.

Option to purchase.

An option to purchase at any time is void: *London and S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562; *Trevelyan* v. *Trevelyan* (1885), 53 L. T. 853; even if contained in a lease and in favour of the lessee: *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L. J. Ch. 555.

Condition for reverter.

A common law condition for reverter is within the rule, and is consequently void if unlimited in time: *Dunn* v. *Flood* (1883), 25 Ch. D. 629; *Re Hollis Hospital Trustees' and Hague's Contract*, [1899] 2 Ch. 540.

So an exception in favour of a vendor out of a grant of land of a piece of land forty feet wide commencing at a fixed point and

terminating at the nearest road *to be made* by the purchaser is void for remoteness, even if it would take effect under the Statute of Uses: *Savill Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523.

Restraint on anticipation.

It follows from the rule that in a limitation to an unborn woman for life she cannot be restrained from anticipation: *Fry* v. *Capper* (1853), Kay, 163; *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494; on app. 44 Ch. D. 85.

Limitations arising under the exercise of powers.

Where the executory limitation arises under the exercise of a special power, the time from which the period prescribed by the rule begins to run is the date of the assurance creating the power: *Re Brown and Sibly's Contract* (1876), 3 Ch. D. 156; but under the exercise of a general power, the time begins to run from the date of the assurance exercising the power: *Rous* v. *Jackson* (1885), 29 Ch. D. 521; *Re Flower, Edmonds* v. *Edmonds* (1885), 34 W. R. 149; 55 L. J. Ch. 200.

Void *pro tanto*.

And where the exercise of the power transgresses the rule the limitations as a whole are not void, but only such part thereof as transgresses the rule: *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Re Cunynghame's Settlement* (1871), 11 Eq. 324.

That limitations can be released not sufficient.

It was at one time thought that if the persons who would take under the executory limitation were ascertained within the limits of perpetuity so that it could be released, the fact that the limitation did not take effect within such limits was immaterial: *Birmingham Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421; but this is not the law: *London and S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562.

Conveyancing Act, 1882, sect. 10.

An executory limitation, which is not obnoxious to the rule, is in one particular case defeated by the Conveyancing and Law of Property Act, 1882 (45 & 46 Vict. c. 39), s. 10, which enacts that "where there is a person entitled to land for an estate in fee, or for a term of years, absolute or determinable on life, or for term of life, with an executory limitation over on default, or failure, of all or any of his issue, whether within, or at, any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue, who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. (2) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of" the Act, *i.e.*, after 31st December, 1882.

An executory limitation over such as that mentioned in the section could not be barred by a recovery: *Pells* v. *Brown* (1620) Cro. Jac. 590.

The validity of the indefinite powers of sale and exchange contained in strict settlements depends on the doctrine that, so far as they are exercisable at a time later than the terms of the rule would permit, they are subsequent to the estates tail and are therefore barrable: *Waring* v. *Coventry* (1833), 1 My. & K. 249; *Wallis* v. *Freestone* (1839), 10 Sim. 225; and also on the fact that the powers are valid in their inception and consequently can be exercised before the remainder in fee simple becomes vested in possession: *Boyce* v. *Hanning* (1832), 2 C. & J. 334; *Lantsbery* v. *Collier* (1856), 2 K. & J. 709.

Validity of indefinite powers of sale.

There has been much difference of opinion as to whether the rule against perpetuities applies to the vesting of legal remainders. Thus it is said (per Sugden, L.C. of Ireland, *Cole* v. *Sewell* (1843), 4 Dr. & W. 1 at p. 28; and per Lord Brougham, S. C. in D. P. (1848), 2 H. L. C. 186 at pp. 230, 231), that the rule does not apply: while there are *dicta contrà* in *Cattlin* v. *Brown* (1853), 11 Hare, 372, per Sir W. Page Wood, V.-C., at p. 374; and in *Re Frost, Frost* v. *Frost* (1880), 43 Ch. D. 246, per Kay, J., at p. 252; and the decision of Farwell, J., in *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535 (a case on a will) is also *contrà*.

Whether rule applies to legal remainders.

The result deducible from the cases seems to be that the rule against perpetuities partly does, and partly does not, apply to the vesting of legal contingent remainders. The rule deducible from the cases appears to be—a legal contingent remainder (other than a legal contingent remainder to take effect after an estate tail, which, being barrable, cannot be void) must as regards time vest within a life in being and twenty-one years, and is void in its creation unless it must so vest; but, if it must so vest, it can be limited to a person, or class of persons, who could not be a grantee or grantees, if the estate limited by way of remainder had been limited by way of executory limitation, as being possibly, to be ascertained on too remote an event, and will vest in such person if he fulfil the condition, or such member or members, if any, of the class as fulfil the condition, at the moment the remainder vests in possession.

Law deducible from cases.

First, with regard to legal contingent remainders to take effect after an estate tail. Settlement to use of settlor for life, remainder to use of his daughters for lives, remainder as to the share of each daughter to the use of her sons successively in tail male: with cross remainders as to each share: remainder in case all daughters died without issue male as to each daughter's share to the use of her daughters as tenants in common in tail: and in case any daughter should die *without issue* the share of such daughter to go

Examples.

Remainder after estate tail good.

to the use of the daughters of the survivors as tenants in common in tail general. *Held*, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors was a good contingent remainder and not void for remoteness: *Cole* v. *Sewell* (1848), 2 H. L. C. 186.

Remainder void because not certain to vest within time limited by rule.

Secondly, with regard to such remainders not taking effect after estates tail. If land be limited to A. for life, remainder to his sons for life, remainder on the death of the last but one of such sons to the surviving son of A. in fee, the limitation in fee is void: *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535 (a case on a will), because it is possible that such limitation *may* not vest within twenty-one years after A.'s death. It is not rendered valid if in fact all A.'s sons but one die within twenty-one years after A.'s death, for to make the limitation valid the limitation must be such that it *must* vest within twenty-one years after A.'s death.

Remainder good because certain to vest if at all within time limited by rule.

On the other hand, if land be limited to A. for life with remainder in fee to such of A.'s sons as attain twenty-five, the limitation in fee is good as a contingent remainder, but bad as an executory interest: *Symes* v. *Symes*, [1896] 1 Ch. 272. The contingent remainder will vest in such, if any, of A.'s sons as at A.'s death have attained twenty-five; if there are none it will of course fail altogether. Such a limitation is good as a legal contingent remainder because it *must* vest, if it vests at all, within the period allowed by the rule against perpetuities, viz., in the case put, at the moment of A.'s death. But as an executory interest it would be invalid in its creation, because it is limited to A.'s sons who attain twenty-five, and A. might have sons who did not attain that age within twenty-one years after his death, and as regards executory interests possible, and not actual, events are to be considered: moreover, if such a limitation could be created by way of executory interest, it would not fail, as a contingent remainder would, if no son had attained twenty-five at A.'s death, because executory interests do not, while contingent remainders do, fail if not limited to vest immediately on the expiration of the prior estates of freehold.

Law so deduced not accepted by all conveyancers.

It is foreign to the scope of this work to discuss the cases, all of which arise on wills, but it is believed that the law to be deduced from the cases is as above stated. The law as so stated has been impugned by modern writers, many of whom, relying on the older text writers and *dicta*, still contend that the rule against perpetuities has no reference to the creation of legal contingent remainders.

By a deed exercising a special power in a marriage settlement land was limited after the deaths of the appointors, the tenants for

life under the settlement, to the use of A., B., and C., the children of the only son of their marriage, and all other his child and children who should be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain twenty-five, equally as tenants in common; there were seven children of the son, all of whom were living at the death of the survivor of the appointors, but only the three named in the appointment had then attained twenty-five. It was held by North, J., that the limitations were legal contingent remainders, that each child took one-seventh for life, and that subject to such life estates the three who had attained twenty-five took the remainder in fee equally between them as tenants in common: *Symes* v. *Symes*, [1896] 1 Ch. 272.

Limitations to be construed as remainders if possible.

It must be remembered that every limitation which can take effect as a remainder must be construed as a remainder and not as an executory limitation: Fearne, C. R. (10th ed.), vol. i., pp. 386, 395.

Contingent remainders no longer fail by cesser of particular estate.

And although contingent remainders were liable to be defeated by the determination, before the time limited by the settlor, of the particular estate, this is no longer the case, for it will be remembered that, by 40 & 41 Vict. c. 33, s. 1: "Every contingent remainder created by any instrument executed after the passing of the Act [2nd August, 1877] . . . in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use . . . or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use . . . or other executory limitation."

Personal covenants.

The rule against perpetuities does not apply to personal covenants, as to get stone at a quarry: *Keppell* v. *Bailey* (1834), 2 My. & K. 517; *Birland's Trustee* v. *Steel Bros., Ltd.*, [1901] 1 Ch. 279.

Statutory grants and trusts.

The rule does not apply to statutory grants or trusts.

"The trust being created by statute cannot be held invalid on the ground of perpetuity:" per Lindley, L.J., *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520 at p. 530; and a perpetual option to purchase contained in an agreement scheduled to an Act of Parliament, and thereby declared to be valid and binding on the parties thereto, was consequently held good in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352.

Exceptions to rule.

There are exceptions to the application of the rule against perpetuities, for it does not apply to—

1. Conditions in defeasance of terms of years. There seems to

Conditions in defeasance of leases.

be no direct authority as to this, but they are of everyday occurrence and no one has ever suggested they are not valid. *Contrà*, conditions in defeasance of a fee: *Re Hollis Hospital Trustees' and Hague's Contract*, [1899] 2 Ch. 540.

Covenants to renew leases.

2. Covenants for renewal contained in leases: *London and S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562 at p. 579; *Muller* v. *Trafford*, [1901] 1 Ch. 54. *Contrà*, options to purchase contained in leases: *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L. J. Ch. 555.

Negative covenants.

3. Negative covenants which run with the land in equity though not at law: *Tulk* v. *Moxhay* (1848), 2 Ph. 774; *London and S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562 at p. 583; *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265.

Grant to, or trust for, fluctuating body void.

A grant to, or trust for, a fluctuating body is void as tending to a perpetuity.

"The parishioners or inhabitants or *probi homines* of Dale are not capable to purchase lands:" Co. Litt. 3 a.

"The claim by the inhabitants and by the overseers of the township is a claim by persons who are incapable of taking a grant, not being a corporation:" per Erle, C.J., *Constable* v. *Nicholson* (1863), 14 C. B. N. S. 230 at p. 240.

Such right "cannot exist by grant:" per Jessel, M.R., *Chilton* v. *Corporation of London* (1878), 7 Ch. D. 735 at p. 740.

"I have not been able to find any case in which it has been said that such a grant would be good unless where being from the Crown and out of Crown property it might be implied that the Crown created the grantees a corporation for this special purpose:" per Lord Blackburn, *Goodman* v. *Mayor of Saltash* (1882), 7 Ap. Ca. 633 at p. 656.

Contrà, by Crown,

But such a grant by the Crown out of Crown property would be supported as being an incorporation of the fluctuating body *quoad* the grant: *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103.

or in favour of charity.

And such a trust in favour of charitable purposes is good. "No charitable trust can be void on the ground of perpetuity:" per Lord Selborne, L.C., *Goodman* v. *Mayor of Saltash* (1882), 7 Ap. Ca. 633 at p. 642; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520.

A grant of land for the pasture during three months of the year of cows of as many of the inhabitants of a village as were able to buy three cows, and during seven months of the rest of the year to be in common for all the inhabitants, was upheld as charitable: *Wright* v. *Hobert* (1723), 9 Mod. 64.

CHAPTER XXII.

JOINT TENANCY—TENANCY IN COMMON.

Joint Tenancy, how created: Limitations to Corporations, together with Ordinary Persons: To Husband and Wife: Rents reserved to Coparceners: Executory Instruments: Joint Tenants, Tenants in Common in Equity: Tenancy in Common, how created: Express Gift to Survivor.

In limitations to, or trusts for, several it is necessary to determine whether they take as joint tenants or as tenants in common.

What limitations are joint.

A limitation, either at common law, or by way of use, of estates of the same nature to, or a trust for, several, either *nominatim* or as a class, without more, makes them joint tenants.

The estates must be of the same nature.

The estates must be of the same nature; one cannot be freehold and the other chattel: Co. Litt. 188 a, 2 Bl. Com. 181; one cannot be in possession and the other in reversion: Litt. s. 302; Co. Litt. 188 a.

Distinction between grants at common law and under Statute of Uses.

If the conveyance is at common law the estates must begin at the same time, but this is not necessary where the estates are limited by way of use under the Statute of Uses: Co. Litt. 188 a; *Hales* v. *Risley* (1674), Pollexf. 369 at p. 373.

"A. and B. and their heirs."

A limitation to two and their heirs vests the fee simple in them as joint tenants: Fearne, C. R. 35.

"A. and B. and the heirs of their bodies."

A limitation to two men, or to two women, and the heirs of their bodies: Litt. ss. 283, 284; Co. Litt. 182 a, 183 a; or to a man and woman who cannot marry and the heirs of their bodies; or to two men and one woman (or to one man and two women) and the heirs of their bodies: Co. Litt. 25 b, 184 a; makes them joint tenants for life, with several inheritances: Litt. s. 283; Shep. Touch. 111, 112; see this discussed Fearne, C. R. 36. But a limitation to a husband and wife, or to a man and woman who can marry, and to the heirs of their two bodies, gives them an estate in special tail in

the entirety: Co. Litt. 25 b; see *supra*, Chapter on Limitations to Heirs.

It is said by Fearne, C. R. 36, that a limitation to two successively for life, remainder to the heirs of their bodies, gives them a joint remainder in tail.

A limitation to two and the heirs, or heirs of the body, of one, gives them joint estates for life, and the inheritance to one: Litt. s. 285; Co. Litt. 184 a (see the discussion in the note (2) to p. 184 b).

A. and B. and survivor and heirs of survivor.

As to the construction of a limitation to A. and B. and the survivor of them, and the heirs of the survivor, see Mr. Butler's note to Co. Litt. 191 a; Fearne, C. R. 357.

Joint life estate and joint limitation to heirs.

A limitation to A., B., and C., for their lives, or in tail, followed by a limitation to their heirs, gives them a joint estate in fee simple: Co. Litt. 183 b, 184 a; Fearne, C. R. 35.

Under a limitation to the use of all the daughters of A. and the heirs of their bodies the two daughters took joint estates for life and several inheritances in tail. And though the remainders vested in them at several times, viz., in the eldest daughter as soon as she was born, and the younger afterwards, yet this being by way of use they are joint tenants notwithstanding: *Hales* v. *Risley* (1674), Pollexf. 369 at p. 373.

Limitation to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of all the issues female of their bodies, and the heirs male of the bodies of such issues female. *Held*, that the daughters took as joint tenants for life, with several inheritances: *Matthews* v. *Temple* (1698), Comb. 467; S. C. *sub nom. Sussex* v. *Temple*, 1 Ld. Raym. 310.

Limitation by deed to "issue male" in remainder after the death of their father. *Held*, that the sons took as joint tenants for life: *Fitzherbert* v. *Heathcote* (1771), cited *Bayley* v. *Morris* (1799), 4 Ves. 788, at p. 794.

Use in a settlement in remainder after the death of the survivor of the husband and wife "to permit all and every such children . . . to take the rents . . . to them and their heirs for ever." *Held*, that the children took as joint tenants: *Stratton* v. *Best* (1787), 2 Bro. C. C. 233.

Trust of personalty.

Trust of renewable leaseholds in a marriage settlement for A. for life, remainder for his children. *Held*, that the children took as joint tenants: *Staples* v. *Maurice* (1774), 4 Br. P. C. 580.

A husband took out a policy of assurance on his own life under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10,

whereby his wife and the children of their marriage were to be entitled to receive the funds. *Held*, that the wife and all the children living at the death of the husband, whether born before or after the policy was taken out, were entitled as joint tenants: *In re Seyton, Seyton* v. *Satterthwaite* (1887), 34 Ch. D. 511; *In re Browne's Policy, Browne* v. *Browne*, [1903] 1 Ch. 188.

One of the grantees not capable.

If the limitation be to two, and one cannot take, the other shall take the whole; as if there is a gift at common law to a man and his first-born son, when he has no son: Y. B. 18 Edw. III. (1344) 59; or to a man and to such woman as he shall marry, in either case, the man takes the whole: *Shelley's Case* (1581), 1 Rep. 93 b at p. 101 a. The point is discussed in *Davies* v. *Kempe* (1664), Carter, 2 at p. 5; S. C. *sub nom. Davy* v. *Kemp*, O. Bridg. 384 at p. 387; *Humphrey* v. *Tayleur* (1752), 1 Amb. 136; 1 Dick. 161 (cases on wills).

"Joint and natural lives."

"During their joint and natural lives," held to mean during their joint lives, and during the natural life of each of them: this construction was helped by the context: *Smith* v. *Oakes* (1844), 14 Sim. 122.

Benefit of survivorship.

Words stating that joint tenants for life are to have the benefit of survivorship, do not prevent them from being joint tenants: Co. Litt. 191 a.

Jointly and severally.

"Jointly and severally" creates a joint tenancy: *Slingsby's Case* (1586), 5 Rep. 18 b at p. 19 a; Jenk. Cent. 262, ca. lxiii.

At common law.

A remainder limited at common law to the heirs of A. and B., two living persons, makes them tenants in common, because their estates do not begin at the same time: Co. Litt. 188 a; Y. B. 24 Edw. III. (1550) 29 a, cited *Justice Windham's Case* (1588), 5 Rep. 6 b at p. 8 a; *Sammes' Case* (1609), 13 Rep. 54 b at p. 57.

Title by Statute of Limitations.

Two persons were in lawful possession of land as tenants under a tenant for life; on her death they remained in possession without paying rent till they had acquired a title under the Statute of Limitations. *Held*, that they were joint tenants, as they had acquired title at the same instant: *Ward* v. *Ward* (1871), L. R. 6 Ch. 789.

Under the Statute of Uses.

"If a man make a feoffment *to the use* of himself and of such wife as he should afterwards marry for term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times:" Co. Lit. 188 a; Gilbert's Uses and Trusts, p. 71 (3rd ed. p. 135, n. 10); 2 Bl. Com. 182; *Mutton's Case* (1567), Dy. 274 b; Moore 96, pl. 240; 1 Anders. 42, ca. cvi.; 2 Leon. 223; *Brent's Case* (1574), Dy. 340 a; 2 Leon. 14; *Shelley's*

Case (1581), 1 Rep. 93 b at p. 101 a; *Woodliff* v. *Drury* (1594), Cro. Eliz. 439; *Sammes' Case* (1609), 13 Rep. 54 b at p. 56 b.

Exceptions.

There are certain exceptions to the rule that a limitation to several creates a joint tenancy. The most important of these are as follows:—

The Crown.

First. The Crown cannot be joint tenant or tenant in common with a subject, but takes the whole. This exception extends to chattels, real and personal: 2 Bl. Com. 184, 409.

Land was demised for years to husband and wife: the husband committed suicide. *Held*, that the term escheated to the Crown for the felony: *Hales* v. *Petit* (1561), Plowd. Comm. 257; apparently on the ground that the escheat occurred prior to the husband's death.

Corporations aggregate.

Second. Two corporations aggregate, or a corporation aggregate and a natural person, cannot be joint tenants at common law: Bacon's Abridgment (7th ed.), Joint Tenants, B.; Comyns' Digest, Estates by Grant, K. 2 (5th ed., vol. 4, p. 107); Williams' Saunders (5th ed., vol. 2, pt. 2, p. 318, n. (4)); 2 Blackst. Com. 184.

This exception applies to chattels real and personal: 2 Roll. Abr. 91, L. 4, "Joint Tenants and Tenants in Common;" *Law Guarantee and Trust Society* v. *Bank of England* (1890), 24 Q. B. D. 406.

Modern statutes *contrà.*

But by the National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 6, "Stock may be transferred to and held in the names of an individual and a body corporate, or of two or more bodies corporate, and any such holding shall in its relation to the Bank [*sc.* of England or of Ireland, see sect. 9] be deemed a joint tenancy." Stock in the Act means "all stock for the time being transferable in the books of the Bank except so far as there is anything to the contrary in any Act under which the stock was created" (sect. 8).

And by the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances, or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants, and on a dissolution of a body corporate the property shall devolve on the other joint tenant.

Corporations sole.

Third. Two corporations sole, or a corporation sole and a natural person, cannot be joint tenants of land; this exception

does not extend to chattels, real or personal: Co. Litt. 189 b, 190 a; Comyns, Dig., Estates by Grant, K. 1 (5th ed., vol., 4, p. 107); 2 Blackst. Com. 184, 409.

Fourth. A limitation made or trust declared, in deeds executed prior to 1883, to or for husband and wife, in words which would have made them joint tenants if they had not been husband and wife, creates in them a tenancy by entireties: *Green* d. *Crew* v. *King* (1778), 2 Wm. Bl. 1211; *Ward* v. *Ward* (1880), 14 Ch. D. 506; a consequence of which was that, under such a limitation made to husband and wife, and a stranger, the husband and wife took one moiety only, and the other person the other moiety: Litt. s. 291; Co. Litt. 187 a; *Back* v. *Andrew* (1690), 2 Vern. 120; Prec. Ch. 1; *Gordon* v. *Whieldon* (1848), 11 Beav. 170 (a case of a legacy).

Husband and wife.

Husband and wife and a stranger.

The same construction is placed on a grant to husband and wife and a third person in common: *Re Wylde* (1852), 2 D. M. & G. 724, at p. 728 (a case on a legacy).

In deeds executed after 1882 the husband and wife take as joint tenants: *Thornley* v. *Thornley*, [1893] 2 Ch. 229; but if they take conjointly with a stranger they still only take one share between them, the wife taking one moiety of that share for her separate use: *Re March, Mander* v. *Harris* (1884), 27 Ch. D. 166; *Re Jupp, Jupp* v. *Buckwell* (1888); 39 Ch. D. 148 (both cases on wills); the reason being that the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), does not affect the construction of the deed.

Fifth. A rent granted by one coparcener to other coparceners and their heirs for equality of partition, and a rent reserved to coparceners and their heirs on a feoffment made by them in fee, go in coparcenery: Co. Litt. 169 b; *Justice Windham's Case* (1588), 5 Rep. 6 b at p. 8 a; Y. B. 38 Edw. III. (1364), 26 b; Y. B. 15 Hen. VII. (1499), 14.

Rents reserved to coparceners.

Sixth. The tendency of the Courts is to construe words in an executory instrument importing joint tenancy as giving a tenancy in common: *Taggart* v. *Taggart* (1803), 1 Sch. & Lef. 84; *Mayn* v. *Mayn* (1867), L. R. 5 Eq. 150; but *Bustard* v. *Saunders* (1843), 7 Beav. 92; and *Re Bellasis' Trust* (1871), L. R. 12 Eq. 218, are *contra*.

Executory instruments.

Moreover, there are certain cases in which, though a joint tenancy is created at law, the parties are in equity tenants in common. The most important of these cases are:—

Joint tenants tenants in common in equity.

First. Where a purchase is made by several, and is paid for by them in unequal shares: *Robinson* v. *Preston* (1858), 4 K. & J. 505;

Purchase by several paid for unequally.

if the money is paid in equal shares, they are joint tenants: *Lake* v. *Gibson* (1729), 1 Eq. Ca. Ab. 290, pl. (3); *Aveling* v. *Knipe* (1815), 19 Ves. 441 (where there was only an agreement to purchase); unless the conveyance is made to one only: *Morris* v. *Barrett* (1829), 3 Y. & J. 384; or an intention to hold in severalty is found in the surrounding circumstances: *Edwards* v. *Fashion* (1712), Prec. Ch. 332; *Robinson* v. *Preston* (1858), 4 K. & J. 505; direct evidence of intention to that effect is inadmissible: *Harrison* v. *Barton* (1860); 1 J. & H. 287.

Evidence of circumstances.

Purchase for purposes of trade.

Second. Where a purchase is made by several for the purpose of joint trade: Co. Litt. 182 a; Lindley on Partnership, Bk. III., c. 5, s. 1 (7th ed.), p. 378; *Hamond* v. *Jethro* (1611), 2 Brownl. & G. 97 at p. 99; *Jeffereys* v. *Small* (1683), 1 Vern. 217; *Lake* v. *Gibson* (1729), 1 Eq. Ca. Ab. 290, pl. (3); S. C. affirmed on appeal, *sub nom. Lake* v. *Craddock* (1732), 3 P. Wms. 158; *Lyster* v. *Dolland* (1792), 1 Ves. Jun. 431 at p. 435. See the remarks of Lord Eldon, C., in *Jackson* v. *Jackson* (1804), 9 Ves. 591 at p. 596; *Davies* v. *Games* (1879), 12 Ch. D. 813; Partnership Act, 1890 (53 & 54 Vict. c. 89), s. 20. The question whether the property is to become part of the partnership estate depends on all the circumstances of the case: Lindley on Partnership, Bk. III., c. 4 (7th ed.), pp. 360 *et seq.*; *Bank of England Case* (1861), 3 D. F. & J. 645.

Mortgagees.

Third. Persons advancing money on mortgage, even in equal shares: *Petty* v. *Styward* (1632), 1 Rep. Ch. 31; 1 Eq. Ca. Ab. 290; *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 252 at p. 258; 3 Atk. 731 at p. 734; *Re Jackson, Smith* v. *Sibthorpe* (1887), 34 Ch. D. 732. In *Morley* v. *Bird* (1798), 3 Ves. 629 at p. 631, Arden, M.R., draws a distinction between mortgagees and volunteers taking under a will or deed of gift; and see per Page Wood, V.-C., *Harrison* v. *Barton* (1860), 1 J. & H. 287 at p. 292.

A consequence of the last mentioned equitable doctrine was that in all mortgages made prior to 1882 to more than one mortgagee, it was usual to insert a joint account clause stating that the money belonged to the mortgagees jointly in equity as well as at law, as in the absence of such a clause the receipt of the survivors of the mortgagees was not a good discharge; but such a clause is rendered unnecessary in mortgages made since 1881, by sect. 61 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that in mortgages made since 1881, to secure money expressed to be advanced on a joint account, or to more than one mortgagee jointly, the money shall as between the mortgagees

and the mortgagor be deemed to be and remain money belonging to them on a joint account, and that the receipt of the survivors or last survivor shall be a complete discharge.

The cases in which equity holds that there is a tenancy in common are all collected in the notes to *Lake* v. *Gibson*, 2 W. & Tud. L. C. Eq. 952 (7th ed.).

Tenancy in common.

A limitation to, or trust for, several, either *nominatim* or as a class, with any words implying a distinctness of interest, makes them tenants in common.

Examples.

"Equally to be divided:" see *Anon.* (1685), 2 Vent. 365; *Fisher* v. *Wigg, Wiggs* or *Wicks* (1700), 1 P. Wms. 14; 12 Mod. 296; Holt, 369; 1 Ld. Raym. 622; 1 Salk. 391; 3 Salk. 206; Com. Rep. 88, 92; Lilly's Entries, 205; *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 252; 3 Atk. 731; *Goodtitle* d. *Hood* v. *Stokes* (1753), 1 Wil. 341.

"In rateable and equal manner:" *Bois* v. *Roswell* (1668), 1 Lev. 232.

Grant to L., T. and S. respectively, their respective executors, &c., of an annuity for the life of P., charged on certain lands, habendum to L., T. and S., their respective executors, &c., for the life of P. The deed contained covenants by P., with L., T. and S., their respective executors, &c. The consideration was advanced in equal shares by L., T. and S. *Held*, that L., T. and S. took the annuity in equal shares as tenant in common: *Fleming* v. *Fleming* (1855), 5 Ir. Ch. R. 129.

Jointly and severally.

"Jointly and severally," creates a joint tenancy: *Slingsby's Case* (1586), 5 Rep. 18 b at p. 19 a; Jenk. Cent. 262, ca. lxiii.

Voluntary settlement after a life estate to A., and in default of issue of A., "to the use of the right heirs of E., deceased, and J., the two sisters of the said A., their heirs and assigns, as tenants in common for ever." *Held*, that J. took a vested remainder in fee in a moiety, E. having left an only son as her heir: *Hawes* v. *Hawes* (1880), 14 Ch. D. 614.

Gift over to survivor.

Where the words implying distinctness of interest are followed by an express gift to the survivor, there is a tenancy in common with a gift over to the survivor: *per* Lord Westbury in *Taaffe* v. *Conmee* (1862), 10 H. L. C. 64 at p. 78, a case on a will; there does not appear to be any case on a deed.

CHAPTER XXIII.

NEXT OF KIN—EXECUTORS—PERSONAL REPRESENTATIVES.

Next of Kin are not Persons entitled under Statute of Distributions: Reference to Intestacy: Next of Kin take as Joint Tenants: Persons entitled under the Statute take as Tenants in Common: Neither Husband nor Wife is included in Next of Kin: Persons taking prior Interests not excluded from Next of Kin: Next of Kin ascertained at Death of Propositus: Artificial Class may be created: Meaning of "Then": Trust for Executors of A. is Trust for A.: Executors and Next of Kin distinguished: Executors take for benefit of Estate of Deceased: "Personal Representatives" means Executors: But by Context may mean Next of Kin: "Next of Kin or Personal Representative": "Legal Representatives": "Representatives."

THE ultimate trusts of personalty in marriage settlements are often declared in favour of next of kin, and it is consequently necessary to determine who are meant by that expression.

Next of kin does not mean next of kin according to Statute of Distributions.

"Next of kin" means the nearest blood relations to the propositus, not the next of kin according to the Statute of Distributions: 22 & 23 Car. II. (1670) c. 10.

"The words 'nearest and next of kin' are perfectly exempt from ambiguity, and in their general sense unquestionably denote the persons nearest in proximity of consanguinity. . . . No evidence exists that the parties intended to refer to the Statute. The Statute clearly adverts to two classes, next of kin in equal degree, and next of kin by right of representation; not confounding but expressly distinguishing them:" per Plumer, M.R., *Brandon* v. *Brandon* (1819), 3 Swan. 312 at p. 318; 2 Wils. Ch. 14 at p. 21. This decision was mentioned with approval by the Lords Commissioners Shadwell and Bosanquet, in *Elmsley* v. *Young* (1835), 2 My. & K.

780, in which case *Phillips* v. *Garth* (1790), 3 Bro. C. C. 64, and *Hinckley* v. *Maclarens* (1832), 1 My. & K. 27, which are *contrà*, were overruled.

"The common use which is made of the term 'next of kin,' in connection with the administration and distribution of personal estates in cases of intestacy, may occasionally have given rise to a notion, that the persons to whom the law gives the succession are legally and for all purposes to be considered as the next of kin; yet this does not appear to be a notion which can be supported in law. The construction given to the term 'next of kin,' with reference to the Statute of Car. II., 22 & 23 Car. II. (1670) c. 10, shows that the next of kin entitled to administration and distribution are not deemed to be next of kin for all purposes; and I apprehend that, in all other cases, the terms 'next or nearest of kin' must be construed according to their simple and obvious meaning, or according to the legal construction of the whole instrument in which they occur:" per Lord Langdale, M.R., *Withy* v. *Mangles* (1841), 4 Beav. 358 at p. 367; 10 L. J. N. S. Ch. 391 at p. 394.

"The Statute of Distributions accurately preserves the distinction between 'next of kin' and those to whom it directs the distribution of the personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expression 'next of kin under the Statute' be considered as having reference to this provision of the Statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether 'next of kin under the Statute' has not been inaccurately used as describing those who are entitled under the Statute, but whether the term 'next of kin,' without any reference to the Statute, has received any such judicial construction. A short examination of the cases will show that the contrary is established by a very great preponderance of authority. . . . I think that the appellant has wholly failed in proving that the term *next of kin*, used *simpliciter*, has by a technical or conventional construction obtained the meaning of 'those who would be entitled in case of intestacy under the Statute of Distributions:' and I am, therefore, of opinion that these words must be construed in their natural and obvious meaning of nearest in proximity of blood:"

per Lord Cottenham, C., *Withy* v. *Mangles* (1843), 10 Cl. & F. 215 at pp. 248, 249, 253.

"Next of kin of equal degree."

It has been held that "next of kin of equal degree," mean next of kin *simpliciter: Anon.* (1815), 1 Madd. 36; but that "the persons legally entitled thereto as the next of kin of A." mean his statutory next of kin: *Kidd* v. *Frasier* (1851), 1 Ir. Ch. R. 518.

Reference to intestacy.

An express reference to intestacy is equivalent to a reference to the Statute: *Re Gray's Settlement, Akers* v. *Sears*, [1896] 2 Ch. 802; but this is not the case where the reference is to death "sole and unmarried:" *Re Webber's Settlement* (1850), 17 Sim. 221; 19 L. J. N. S. Ch. 445; "as if she had not been married:" *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274; or "unmarried:" *Halton* v. *Foster* (1868), L. R. 3 Ch. 505 (a case on a will).

Death "unmarried."

"Own blood."

A trust for the next of kin of A. "of his own blood and family" does not exclude next of kin of the half-blood: *Cotton* v. *Scarancke* (1815), 1 Madd. 45; (the head-note that the next of kin under the Statute took is inaccurate; no such decision was given); *Brigg* v. *Brigg* (1885), 33 W. R. 454; 54 L. J. Ch. 464; and a trust for the "next of kin in blood" of A. is the same as a trust for the next of kin, and does not exclude the implication of a reference to the Statute where such implication would otherwise arise: *Re Gray's Settlement, Akers* v. *Sears* [1896] 2 Ch. 802.

Next of kin take as joint tenants.

Under a limitation to, or trust for, next of kin *simpliciter*, they take as joint tenants.

In a marriage settlement the ultimate trust of the wife's property was "for such person or persons as at the time of her death shall be her next of kin." The wife died, leaving a father, mother, and child. *Held*, that they took as joint tenants: *Withy* v. *Mangles* (1841), 4 Beav. 358; 10 L. J. N. S. Ch. 391; (1843), 10 Cl. & F. 215.

Realty limited to "next of kin."

Where the words were, "for the next of kin as if she had not been married, and not including the husbands of both or either of her sisters." *Held*, that the sisters who were her next of kin took as joint tenants, and the property being realty and there being no words of limitation, that they took for life only: *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274.

Statutory next of kin take as tenants in common.

Under a limitation or trust of personalty in favour of the next of kin according to the Statute, they take as tenants in common, in the shares specified in the Statute.

Ultimate trust in a marriage settlement of wife's property "for such person or persons as at the time of her death shall be her next of kin under and according to the Statute made for the distribution of the estates of persons dying intestate, but exclusively of" her husband "his executors, &c." *Held*, that the statutory next of kin took as tenants in common: *Re Ranking's Settlement* (1868), L. R. 6 Eq. 601.

Next of kin does not include husband or wife.

Neither in next of kin, nor in next of kin according to the Statute, is included the surviving husband or wife of the propositus.

"The description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti;* her personal property vests in him by the marriage." (See now the Married Women's Property Act, 1882.) "At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the Statutes, there is no law that gives the husband a right by force of the Statute to administer to his wife. The husband's right is supposed in all the Statutes. The Statute 21 Hen. VIII. (1529), c. 5, which directs who shall have administration, takes no notice of the husband: they are to grant it to the widow or the next of kin, or both. That Statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower; for the law gives it to him; and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property, he had a right to it. The Statute of Frauds (29 Car. II. (1676) c. 3) has a clause (s. 25) that the Statute of Distributions (22 & 23 Car. II. (1670) c. 10) shall not prejudice the right of the husband; under an apprehension that his right might be considered to be affected by that Statute. The husband is not of kin to the wife, nor she to him. The Statute gives administration to the widow. She is not next of kin, but takes as widow:" per Lord Loughborough, C., *Watt* v. *Watt* (1796), 3 Ves. 244 at p. 246; *Bailey* v. *Wright* (1811), 18 Ves. 49; *Cholmondeley* v. *Lord Ashburton* (1843), 6 Beav. 86; *Kilner* v. *Leech* (1847), 10 Beav. 362; *Noon* v. *Lyon* (1875), 33 L. T. N. S. 199.

Persons taking under prior trusts

Persons taking prior interests under the instrument are not excluded from taking under a limitation to, or

may take under ultimate trust for next of kin.

trust for, next of kin, or next of kin according to the Statute.

In *Elmsley* v. *Young* (1835), 2 My. & K. 82 and 780, the tenant for life took under an ultimate trust for the next of kin: and in *Smith* v. *Smith* (1841), 12 Sim. 317; *Withy* v. *Mangles* (1843), 10 Cl. & F. 215; and *Upton* v. *Brown* (1879), 12 Ch. D. 872, a child who took an interest contingently on his attaining twenty-one, but who died under that age, took under the ultimate trust for the next of kin.

Next of kin ascertained at death of propositus.

The "next of kin," or "next of kin or persons entitled according to the Statute," are to be ascertained at the death of the propositus.

By a marriage settlement a fund was settled on the wife, if she should survive the husband, for life, remainder to their children who should attain twenty-one, &c.; in default of any such child, as the husband should appoint; in default of appointment, in trust for his next of kin according to the Statute and as if he had died intestate. There was issue one son only. The husband died first without having appointed; then the son died under twenty-one, and lastly the wife died. *Held*, that the fund vested in the son as his father's next of kin at the father's death, and not in the persons who would have been next of kin of the father if he had died at the son's death: *Smith* v. *Smith* (1841), 12 Sim. 317.

Personalty settled on marriage upon trusts for A. (the husband), and B. (the wife), successively for life, and for the benefit of the children, with an ultimate trust "if B. shall happen to die in the lifetime of A., then the trustees shall and do, immediately after the death of A. and failure of issue," assign, &c., the residue of the trust funds and premises to such persons as B. shall appoint, and in default of appointment, "in trust for such person or persons (other than and except A.) as shall *then* be the next of kin of B., and would have been entitled thereto under the Statutes for the distribution of the personal estates of intestates, in case she had died sole and unmarried and intestate;" B. made no appointment; she died before A. without having any issue. *Held*, that her next of kin at her own death, and not those who would have been her next of kin if she had died at the death of her husband, were entitled: *Wheeler* v. *Addams* (1853), 17 Beav. 417.

By marriage settlement personalty was settled on trust for the separate use of A. (the intended wife) for life, with remainder for

the issue of the marriage as B. (the intended husband) should appoint, and in default of issue, for B., if then living, or in case of his death, as he should by deed or will appoint, and in default of appointment, "*then* upon trust immediately after the death of A. without leaving B., or any child or children, grandchild or grandchildren, her surviving, to pay the said principal sum and all interest which may *then* be due thereon to such person or persons as under the Statute of Distributions would *then* be entitled to the same as the next of kin of B. in case B. shall have died intestate." B. made no appointment; he died before A., without having any issue. *Held*, that the statutory next of kin of the husband at his death, and not those who would have been such if he had died at the death of the wife, were entitled to the fund under this ultimate limitation: *Day* v. *Day* (1870), Ir. R. 4 Eq. 385; 18 W. R. 417. Other cases are *Upton* v. *Brown* (1879), 12 Ch. D. 872; *Hunter* v. *Tedlie* (1880), 7 L. R. Ir. 448 at p. 454.

Ultimate trust of personalty for the wife if she survived the husband, but if she died in his lifetime, "for the person or persons who under or by virtue of the Statutes," &c., "would on her decease have been entitled thereto in case she had survived her husband and had *then* died possessed thereof intestate." *Held*, that the wife's next of kin at the time of her death were entitled: *Re Bradley* (1888), 58 L. T. N. S. 631; but Kay, J., in *Clarke* v. *Hayne* (1889), 42 Ch. D. 529, refused to follow this case (see *infrà*).

Artificial class may be created.

It may, however, be expressly stated that the next of kin, or next of kin or persons entitled under the Statute, are to be ascertained at some other time.

Examples.

Where the trust was "for such person or persons as at the time of the death of A. (the husband) shall be the next of kin of B. (his wife), and would be entitled to her personal estate as if she had died sole and unmarried," B. died in the lifetime of A. leaving five brothers, four of whom died in the lifetime of A. *Held*, that the surviving brother alone was entitled: *Re Webber's Settlement* (1850), 17 Sim. 221; 19 L. J. N. S. Ch. 445.

Meaning of "then."

Where the interest of the next of kin does not take effect in possession at the death of the propositus the word "then" is not alone sufficient to prevent the rule applying, and to cause the next of kin to be ascertained at the time they take in possession.

It is pointed out by Thesiger, L.J., in *Mortimer* v. *Slater* (1877), 7 Ch. D. 322, at p. 329 (a case on a will), that there are three cases:—First, where the word "then" is attached to the description of the class—in which case the class is to be ascertained at the

time so pointed out, *i.e.*, the time of distribution. Second, where words of futurity without any adverb of time are attached to the description of the class; in which case the class is to be ascertained at the death of the propositus. Third, where the word "then" is used, not in connection with the description of the class, but in connection with the time when the interest of the class is to come into being; in which case the class is to be ascertained at the death of the propositus. See also *Hunter* v. *Tedlie* (1880), 7 L. R. Ir. 448 at pp. 455, 456.

In *Pinder* v. *Pinder* (1860), 28 Beav. 44, where the ultimate trusts in a marriage settlement were—"but if A. (the wife) shall die in the lifetime of B. (the husband), then, after the decease of B. and such failure of issue as aforesaid," as A. should appoint, and in default of appointment, "in trust for the person or persons who, under the Statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of A. in case she had survived B. and had died possessed of the same intestate," to be divided, &c.; and in *Chalmers* v. *North* (1860), 28 Beav. 175; 3 L. T. N. S. 140, where the trusts were "for such person or persons as, at the decease of the wife, would, under the Statutes for the distribution of intestates' effects, have been entitled to her personal estate, as her next of kin, in case she had survived her husband and afterwards died intestate;" it was held that the persons intended were those who would have been the wife's next of kin if she had survived and died immediately after her husband.

Ultimate trust of personalty after death of husband and wife "for the person or persons who under the Statutes made for the distribution of the estates of intestates would *then* be entitled thereto in case the *wife, having survived* the husband, were to die possessed thereof and intestate, and to be divided," &c. The wife died in the husband's lifetime. *Held*, by Kay, J., that the persons to take were not the wife's next of kin according to the Statute, but the persons who would have been her next of kin according to the Statute if she had died immediately after the husband: *Clarke* v. *Hayne* (1889), 42 Ch. D. 529. The learned Judge refused to follow *Druitt* v. *Seaward* (1885), 31 Ch. D. 234 (a case on a will), and *Re Bradley* (1885), 58 L. T. N. S. 631, cited *supra*.

Next of kin of name of B.

Real estate was settled, after other limitations, "to the use of all and every the nearest of kin in equal degrees to D. M. at the time of her death without issue, of the name of B., share and share alike as tenants in common, their heirs and assigns," the Court

intimated that the limitation would admit of four different constructions, viz. :—First, the union of both characters, *i.e.*, that the party taking should be the nearest of kin, and should also have the name of B.; secondly, that the party taking should be the nearest of kin of the stock and blood; thirdly, that he should be the nearest of kin at the death of D. M. bearing the name of B.; and fourthly, that he should be the nearest of kin at the death of D. M. *born* of the name of B.; and without deciding which was the correct construction, held that the fourth was not: *Doe* d. *Wright* v. *Plumtree* (1820), 3 B. & Ald. 474.

Trust for the executors of a living person is trust for him.

A limitation or trust of personalty, in favour of the executors of a living person, or in favour of a living person for life, with remainder either mediately or immediately to his executors, vests the property absolutely in him, subject in the last-mentioned case to the rights of any persons taking in remainder after the life estate.

"If a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him so distinctly as he may grant away either of them. . . . If a man makes a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance; (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs;) even so are the testators and the executors *correlativa* as to any chattel. And therefore if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself as well as if it had been limited to him and his executors:" Co. Litt. 54 b.

Notwithstanding this extract from Coke, there seems to be some doubt whether a term limited to A.'s executors, as distinguished from A. and his executors, to commence on A.'s death, vests in A.: *Granew* v. *Parker* (1557), Benl. 74; *Cranmer's Case* (1571), Dyer, 309 a; *Spark* v. *Spark* (1598), Cro. Eliz. 666; (1600) Cro. Eliz. 840; (1602) Moore 666; Yelv. 9; Shep. Touch. 162; Hale's MSS. Co. Litt. 54 b, n. 4.

Executors and next of kin distinguished.

"There is a great difference between a limitation to the executors and administrators and a limitation to the next of kin. The former is, as to personal property, the same as a limitation to the right heirs as to real estate; but a limitation to the next of kin is like a

limitation to heirs of a particular description; which would not give the ancestor, having a particular estate, the whole property in the land:" per Grant, M.R., *Anderson* v. *Dawson* (1808), 15 Ves. 532, at p. 536.

The distinction between "executors" and "next of kin" is well illustrated by *Grafftey* v. *Humpage* (1838), 1 Beav. 46; on app. 3 Jur. 622, where, by a marriage settlement, the ultimate trust of certain specified property of the wife was for her next of kin; and the settlement contained a covenant by the husband to settle the other property of the wife on the same trusts as those of the specified property. At the date of the settlement certain property not mentioned in the settlement stood limited by a will on trust for the wife for life, remainder to her children, remainder as she should appoint, remainder "to her executors, administrators, or assigns." The husband survived the wife; there were no children, and the wife made no appointment. *Held*, that the last-mentioned property passed to the husband as his wife's administrator, and was bound by the covenant.

"The authorities fully establish that the effect of a settlement by deed limiting property to the executor or administrator of the settlor is to make such property subject to the disposition of the settlor by will, or to be dealt with under the Statute of Distributions; . . . and the settlor in such cases has a present control over the property settled for his own benefit, or, in other words, the settlor has as unlimited a power of disposition as he had before the settlement:" per Lord Truro, C., *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & Gor. 559, at p. 563; 21 L. J. Ch. 465 at p. 466.

Where trust funds were settled to the separate use of a married woman for her life, and after her death upon trust for such persons as she should by will appoint, and in default of appointment for her executors or administrators, she (having become a widow) applied for a transfer of the funds to herself and assignees, offering to release her power of appointment. *Held*, that she was absolutely entitled to the trust funds: *Page* v. *Soper* (1853), 11 Ha. 321; *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622. See also *Horseman* v. *Abbey* (1819), 1 Ja. & W. 381; *Collier* v. *Squire* (1827), 3 Russ. 467; *Daniel* v. *Dudley* (1841), 1 Phil. 1; on app. from and reversing 11 Sim. 163; *Allen* v. *Thorp* (1843), 7 Beav. 72.

"Executors or administrators of her own family."

Where in a marriage settlement the ultimate trust of the wife's fortune was "for the executors and administrators of the wife's own family," and of the husband's fortune "for the executors or administrators of the husband of his own family," it was held that

in the wife's case this meant her next of kin at her death, and in the husband's case his executors or administrators: *Smith* v. *Dudley* (1838), 9 Sim. 125; but "executors or administrators" cannot mean next of kin: per Lord Cottenham, C., *Daniel* v. *Dudley* (1841), 1 Phil. 1 at p. 6; and "executors, administrators, and assigns" cannot mean next of kin: per Lord Langdale, M.R., *Grafftey* v. *Humpage* (1838), 1 Beav. 46 at p. 52.

"Executors or administrators."

"Executors administrators and assigns."

Executors take for benefit of their testator's estate.

Any interest taken by the executors or administrators of A., under a trust for "A., his executors or administrators," or "the executors or administrators of A.," is taken by them as part of A.'s estate: *Collier* v. *Squire* (1827), 3 Russ. 467; *Wellman* v. *Bowring* (1830), 3 Sim. 328; *Daniel* v. *Dudley* (1841), 1 Phil. 1; *Howell* v. *Gayler* (1842), 5 Beav. 157; *Morris* v. *Howes* (1845), 4 Ha. 599; *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & G. 559; 21 L. J. N. S. Ch. 465.

The construction is not altered by the addition of the words "for their own use and benefit:" *Hames* v. *Hames* (1838), 2 Keen, 646; 7 L. J. N. S. Ch. 123; *Meryon* v. *Collett* (1845), 8 Beav. 386; 14 L. J. N. S. Ch. 369.

"It is extremely improbable that the settlor, executing a marriage settlement, and professing that his object was to make a provision for his intended wife, and the issue of the marriage, should silently intend to make a provision for the person who should chance to be his administrator—perhaps a small creditor—perhaps a person to whom administration might be granted *durante minori aetate*, or upon some other contingency; and unless the words are incapable of any other construction, and the Court is absolutely compelled, by force of them, to impute that highly improbable intention, that conclusion ought not to be adopted:" *Hames* v. *Hames* (1838), 2 Keen, 646 at p. 650; 7 L. J. N. S. Ch. 123. "I think it . . . probable that his only object was . . . to use words making it clear to the trustees that they might safely transfer the whole fund to his executors and administrators, and he thereupon relieved them from their trust; that the fund was to be disposed of by the executors or administrators without the trustees being under the necessity of looking to its application; and that the words were not used for the purpose of placing the money in the hands of an executor or administrator for his own personal enjoyment, but for

the purpose of enabling him to make a proper application of it, without the interference of the trustees. As far as the trustees were concerned, it was to be the absolute property of the legal personal representatives:" per Lord Langdale, M.R., *Meryon* v. *Collett* (1845), 8 Beav. 386 at p. 394; 14 L. J. N. S. Ch. 369 at p. 370. See also *Marshall* v. *Collett* (1835), 1 Y. & C. Exch. 232.

Freehold purchased by lessee's executors under option to purchase.

Covenant in lease of land by lessor with the lessee, "his executors, administrators, and assigns," that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs, and assigns, then the lessor, his heirs, and assigns would accept a named sum for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. *Held*, that the option to purchase was attached to the lease and passed with it; that on the death of the lessee intestate it consequently passed with the lessee's personal estate to his administrator, but that the administrator, who was also his heir, could not make a good title to the fee simple, which he had purchased under the option, without the concurrence of the statutory next of kin of the lessee: *Re Adams and The Kensington Vestry* (1883), 24 Ch. D. 199; on app. 27 Ch. D. 394.

Personal representatives means executors.

A trust of personalty for the "personal representatives" of A. is a trust for his executors or administrators in their representative character.

"I take it to be clear that I must construe the words 'such person or persons as shall be her personal representative or representatives' according to their ordinary meaning, and that ordinary meaning is 'executors and administrators:' that the words being in a marriage settlement, as distinguished from a will, are not to be taken as having other than their ordinary meaning, unless there is something in the context to give them a different meaning. The question, then, is whether, upon the construction of this particular instrument, the words have any other than their ordinary meaning:" per Hall, V.-C., and he held that they had not: *Re Best's Settlement Trusts* (1874), L. R. 18 Eq. 686 at p. 691.

Next of kin held entitled on context.

But the context may readily show that "personal representatives" means statutory next of kin.

The statutory next of kin were held entitled in *Wilson* v. *Pilkington* (1847), 11 Jur. 537; 16 L. J. N. S. Ch. 169, where there

was a trust "to pay, apply, and dispose of unto and amongst the personal representatives of A. in a legal course of administration"; in *Briggs* v. *Upton* (1871), L. R. 7 Ch. 376, where the words were "pay unto the legal representatives of A. in a due course of administration;" and in *Robinson* v. *Evans* (1873), 22 W. R. 199; 43 L. J. Ch. 82, where the words were "in trust for the person or persons who should happen to be the legal personal representatives or representative of A. at the time of her death" (in each of these cases the words "executors and administrators" were used in other parts of the deed).

"Next of kin or personal representative."

Ultimate trust of personalty in a marriage settlement "for the next of kin or personal representative" of the wife. *Held*, that the wife's next of kin and not her husband, as her administrator, was entitled: *Bailey* v. *Wright* (1811), 18 Ves. 49; on app. (1818), 1 Swanst. 39 (in this case there was no contest between the next of kin and the statutory next of kin).

"Next of kin or personal representative of A. in a due course of administration according to the Statute of Distributions," means the statutory next of kin to the exclusion of the widow of A.: *Kilner* v. *Leech* (1847), 10 Beav. 362.

"Legal representatives."

Settlement of personalty on failure of children of the marriage upon trust to pay a portion of the funds "unto my cousin H. or her legal representatives," another portion "to my cousins A. and M., or their legal representatives, equally between them." *Held*, that there were "three possible interpretations: . . . the words may mean 'executors or administrators' and be therefore merely what are commonly called words of limitation; . . . or, if they are words of substitution, they apply to the date of the settlement, and provide for the possible contingency of the persons named in it being dead, or they are void for uncertainty. Each of these constructions leads to the same result" (viz., that the named persons, who were living at the date of the settlement, took absolutely): *Topping* v. *Howard* (1851), 4 De G. & Sm. 268; S. C. *sub nom. Tipping* v. *Howard*, 15 Jur. 911.

"Representatives."

Trusts in a marriage settlement "for the persons (exclusive of A. and his representatives) who under the Statute of Distributions would have become entitled if the wife had died a *feme sole* and intestate." A. was the wife's brother: on her death he was dead, leaving three daughters surviving. *Held*, that representatives meant those who under the Statute represented the brother as next of kin of the wife, and consequently that A.'s daughters were excluded: *Lindsay* v. *Ellicott* (1876), 46 L. J. Ch. 878.

CHAPTER XXIV.

MARRIAGE—WIFE—CHILDREN—ISSUE.

Marriage: Marriage not Solemnised: Marriage Annulled: Remarriage: Restraint of Marriage: Wife: Coverture: Effect of Decree for Judicial Separation: Separation: Unmarried: Without having been Married: Children: Children includes Child en ventre: Born includes to be born: Children means Legitimate Children: Limitations for unbegotten Illegitimate Children void: Issue means Descendants: Context may confine it to Children: Reference to Parent: Child, Children, and Issue are Words of Purchase.

THERE are collected in this chapter divers cases on words which often occur in deeds, particularly in marriage settlements, but are not words of limitation.

Marriage.

"Marriage" means a valid and effectual marriage, and "solemnised" means validly and effectually solemnised.

Invalid marriage.

A deed was executed whereby "in consideration of the intended marriage between A. and B.," personalty of the intended husband was settled, and it was agreed that the intended wife's real estate should be settled. The marriage ceremony was performed. A conveyance was made in pursuance of the agreement, and afterwards it was discovered, before any issue born, that the marriage was invalid. A. and B. thereupon separated and executed deeds purporting to revoke the prior settlement and conveyance. They subsequently executed a new settlement, and afterwards were validly married. *Held*, that, although the legal estate passed by the conveyance made in pursuance of the first settlement (*Boughton* v. *Sandilands* (1811), 3 Taunt. 342), a court of equity would not hold the parties bound either as to the realty or the personalty by the first settlement, since it was founded on the misapprehension of the parties, who believed that they were to be validly married: *Robinson* v. *Dickenson* (1828), 3 Russ. 399; 7 L. J. O. S. Ch. 70.

Marriage within prohibited degrees.

A settlement of property of a woman who had gone through the ceremony of marriage with her deceased sister's relict was set aside

at the instance of the woman, who was described therein as a wife, on the ground of total failure of consideration: *Coulson* v. *Allison* (1860), 2 Giff. 279; 2 De G. F. & J. 521.

Where a man went through the ceremony of marriage with his deceased wife's sister, and prior thereto made a settlement in consideration of the intended marriage, and declared a trust of the settled property in favour of himself till the solemnisation of the marriage, it was held that, inasmuch as the marriage could not be legally solemnised, the trust for him was absolute: *Chapman* v. *Bradley* (1863), 33 Beav. 61; 4 De G. J. & S. 71; *Pawson* v. *Brown* (1879), 13 Ch. D. 202; *Neale* v. *Neale* (1899), 79 L. T. 629.

A widower, in contemplation of a marriage "which had been agreed upon and was intended shortly to be solemnised" between himself and Clara P. (who was his deceased wife's sister), conveyed realty to trustees to the use of himself for life, remainder to the use of Clara P. during her life, "provided she shall remain a widow and unmarried, and after her decease or marriage, which event shall first happen," to the use of the person who would be entitled thereto if the deed had not been executed. *Held*, by North, J., on a summons issued by the trustees, that the limitation of the life interest to Clara P. was illegal and invalid, and that she took no interest in the property: *Phillips* v. *Probyn*, [1899] 1 Ch. 811, distinguishing *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275, on the ground that in that case all that was decided was that the settlor could not set aside such a settlement.

Marriage not solemnised.

A. covenanted in consideration of (amongst other matters) an intended marriage to settle lands to the use of the intended husband and wife and the heirs of the body of the husband, and afterwards conveyed the lands to those uses. The marriage was not solemnised. *Held*, that the intended husband and wife took as joint tenants for life: *Jones* v. *Boyleson* (1634), Wm. Jo. 345.

Where the marriage was not solemnised, but the parties cohabited and issue was born, it was held that the contract for the marriage mentioned in the settlement was entirely put an end to, and that the property of the intended wife which had been vested in the trustees of the settlement must be re-transferred to her: *Essery* v. *Cowlard* (1884), 26 Ch. D. 191; 32 W. R. 518.

A settlement declared trusts of funds, which it was recited had been transferred to the trustees by the proposed husband and the intended wife's father, and provided that the intended wife's other and after acquired property should be settled. It was executed by the intended wife and her father, but not by the husband or the

trustees, and the funds were never transferred to the trustees. The engagement was broken off. *Held*, that the deed should be cancelled: *Bond* v. *Walford* (1886), 32 Ch. D. 238.

Marriage annulled.

After a marriage had been annulled by the Court, the trustees were ordered to revest the properties comprised in the settlement in the parties by whom they had been vested in the trustees: *Addington*, falsely called *Mellor* v. *Mellor* (1884), 33 W. R. 232.

By an ante-nuptial settlement, in consideration of an intended marriage, the intended husband covenanted that if the intended marriage should take place he would, during the joint lives of himself and his intended wife, pay to the trustees an annuity for the benefit of the intended wife. The marriage was solemnised and was afterwards annulled; it was held that the covenant could not be enforced because the marriage, which was only voidable until the declaration of nullity, had been thereby made void, but that the Court had power, under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, and the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3, to vary the settlement so as to make the annuity available for the lady's benefit notwithstanding the decree of nullity: *Dormer* v. *Ward*, [1901] P. 20; *Attwood* v. *Attwood*, [1903] P. 7.

Remarriage.

It should perhaps be observed that where a settlement purports to be made in consideration of marriage, this means the then intended marriage, so that, in case of divorce at a time when there is no issue, the ultimate trusts arise, notwithstanding the possibility of the parties marrying each other again and having issue: *Bond* v. *Taylor* (1861), 2 J. & H. 473.

Restraint of marriage.

A condition subsequent in partial restraint of marriage, *e.g.*, a condition providing for the forfeiture of interests given by a settlement to a daughter of the settlor and her children upon her marriage at any time without the consent of named persons, is valid and enforceable if accompanied by a gift over: *Re Whiting's Settlement, Whiting* v. *De Rutzen*, [1905] 1 Ch. 96.

Wife.

In a post-nuptial settlement containing a power for the husband by deed, will, or codicil to appoint that, after his death or the determination during his life of a trust of income in his favour, such income should be paid to his *wife*, wife means his then present wife, and not any wife he may have: *Re Hancock, Malcolm* v. *Burford-Hancock*, [1896] 2 Ch. 173.

Coverture.

Coverture means the period during which a woman is married, and in a marriage settlement refers only to the marriage then intended: *Horseman* v. *Abbey* (1819), 1 Jac. & W. 381; *Morris* v. *Howes* (1845), 4 Hare, 599.

Decree of judicial separation determines coverture *qua* property;

But, by virtue of sect. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which provides that "in every case of a judicial separation the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her," coverture is, so far as regards the wife's property, determined by a decree of judicial separation. Hence property acquired by her after the decree is not caught by a covenant to settle property acquired during the intended coverture: *Dawes* v. *Creyke* (1885), 30 Ch. D. 500; or during the intended marriage: *Davenport* v. *Marshall*, [1902] 1 Ch. 82.

And by 21 & 22 Vict. c. 108, s. 8, property to which she is at the date of the decree of judicial separation entitled in remainder or reversion is included in the protection given by the decree: *In re Insole* (1865), L. R. 1 Eq. 470.

But property to which the wife was entitled at the time of the marriage in reversion, but which fell into possession after the decree, was held to be caught by a covenant to settle property to which she was entitled at the time of the marriage in possession or reversion: *Davenport* v. *Marshall*, [1902] 1 Ch. 82.

but not restraint on anticipation as regards property in possession.

The section does not apply to property of the wife's in possession at the date of the decree, so that she is still restrained from anticipating such property if it belongs to her without power of anticipation: *Waite* v. *Morland* (1888), 38 Ch. D. 135; *Hill* v. *Cooper*, [1893] 2 Q. B. 85.

But where a woman was deserted and subsequently a legacy was left to her for her separate use without power of anticipation, and subsequently she obtained a protection order whereby she was "deemed to have been during such desertion of her in the like position in all respects in regard to property . . . as she would be under that Act if she obtained a decree of judicial separation," she was held entitled to payment of the legacy: *Cooke* v. *Fuller* (1858), 26 Beav. 99.

Separation.

Although a separation deed becomes inoperative if the parties subsequently resume cohabitation: *Bateman* v. *Countess of Ross* (1813), 1 Dow, 235; *Nicol* v. *Nicol* (1886), 31 Ch. D. 524; yet if the deed contains, beyond the provisions relating to the separation, trusts of property for the children of the marriage, such trusts are not determined by the resumption of cohabitation: *Ruffles* v. *Alston* (1875), 19 Eq. 539; *Re Spark's Trust, Spark* v. *Massey*, [1904] 1 Ch. 451, compromised on appeal, [1904] 2 Ch. 121; and trusts in favour of the wife are not necessarily so determined: *Crouch* v.

Waller (1859), 4 De G. & J. 302; *Negus* v. *Forster* (1882), 30 W. R. 671; the question being one of construction: see per Bowen, L.J., *Nicol* v. *Nicol* (1886), 31 Ch. D. 524 at p. 529; and where a *quasi*-separation deed was executed between a man and his mistress, a covenant by him to pay her an annuity was held to be operative, although they subsequently resumed cohabitation: *Re Abdy, Rabbeth* v. *Donaldson*, [1895] 1 Ch. 455; and a proviso that if cohabitation is resumed the annuity shall cease is void: *Ex parte Naden, Re Wood* (1874), 9 Ch. 670.

Unmarried.

Unmarried is a word of flexible meaning, but *primâ facie* it means never having been married, *i.e.*, a spinster: per Shadwell, V.-C., *Smith* v. *Smith* (1841), 12 Sim. 317 at p. 326; per North, J., *Blundell* v. *de Falbe* (1888), 57 L. J. Ch. 577; 58 L. T. 621. But it may mean not being married at the time predicated, *i.e.*, not having a husband then living: *Maugham* v. *Vincent* (1840), 4 Jur. 452; per Wood, V.-C., *Re Saunders' Trust* (1857), 3 K. & J. 152 at p. 156; per Lords Cranworth and Wensleydale, *Clarke* v. *Colls* (1861), 9 H. L. C. 601 at pp. 612 and 615.

Where a settlement provided that if there should be more than one child of the intended marriage, and "all of them but one child shall have died unmarried and without issue," and again, if all of the children "shall have died unmarried and without issue," it was held that "unmarried" meant "without ever having been married," because it was applied to a person not married at the time: *Heywood* v. *Heywood* (1860), 29 Beav. 9.

The word most usually occurs in the ultimate trust of the intended wife's property in a marriage settlement, such property being given, after her death, in default of issue of the marriage and an appointment by her, to her next of kin "as if she had died intestate and unmarried," and in certain cases the word has been construed in such instruments to mean "not having a husband then living" in order to provide for children of the wife. Such cases are *Hoare* v. *Barnes* (1791), 3 Bro. C. C. 316, and *Maugham* v. *Vincent* (1840), 4 Jur. 452, on the ground that the settlement contained no provision in default of appointment for the children of the marriage; *Pratt* v. *Mathew* (1856), 22 Beav. 328; 8 D. M. & G. 522; and *Re Woodhouse's Trust*, [1903] 1 Ir. R. 126, on the ground that the settlement did not provide for the issue of the marriage in every possible event; *Re Saunders' Trust* (1857), 3 K. & J. 152, on the ground that there was no provision for the children of a subsequent marriage; and *Mitchell* v. *Colls* (1860), Johnson, 674; S. C. in D. P. *sub nom. Clarke* v. *Colls* (1861), 9 H. L. C. 601, on the ground that the settlement did not provide for

the issue of the marriage in every possible event, nor, in default of appointment, for the issue of a subsequent marriage; and in *Re Forbes* (1899), W. N. 6 (4), the words "died a spinster and intestate" were held to mean "discovert" on the ground that otherwise there was no provision for a child of a previous marriage.

Without having been married.

In certain settlements the phrase used is not "intestate and unmarried," but "intestate and without having been married."

It is now settled that the phrase "without having been married" is to be interpreted in its literal sense of "never having been married," unless "there is anything in the context or in the circumstances of the case which will justify" the Court "in departing from the natural and plain meaning of the words used:" per Vaughan Williams, L.J., in *Re Brydone's Settlement*, [1903] 2 Ch. 84 at p. 92; and see per Romer and Cozens-Hardy, L.JJ., to the same effect, *Ibid.* at pp. 94 and 97; but there are cases in which that expression has been construed to mean "without having contracted the present marriage."

The cases in which this or a similar phrase has been interpreted are as follows:—

Re Norman's Trust (1853), 3 D. M. & G. 965, where it was held that "without being married" meant no more than "without having a husband at the time of her death": *Wilson* v. *Atkinson* (1864), 4 D. J. & S. 455, where the phrase "without having been married" was placed in such a context as to show that it was not meant to exclude an illegitimate child who for the purposes of the settlement was to be regarded as legitimate: *Re Ball's Trust* (1879), 11 Ch. D. 270, where there was no other provision in default of appointment for the children, and Fry, J., held that a child took the funds as the person entitled under the Statute of Distributions, thinking that the Lords Justices had laid down in *Wilson* v. *Atkinson* a general rule that "without having been married" meant without having a husband living: *Upton* v. *Brown* (1879), 12 Ch. D. 872, where there was no absence of provision for children as in *Re Ball's Trust*, but Fry, J., again followed the supposed rule in *Wilson* v. *Atkinson*: *Emmins* v. *Bradford* (1880), 13 Ch. D. 493, where Jessel, M.R., construed the words "without ever having been married" according to their literal meaning, and said that there was no general rule laid down in *Wilson* v. *Atkinson*: *Re Arden's Settlement* (1890), W. N. 204; *Stoddart* v. *Saville*, [1894] 1 Ch. 480; and *Re Mare*, [1902] 2 Ch. 112, in which Stirling, J., Chitty, J., and Kekewich, J., respectively followed the supposed rule in *Wilson* v. *Atkinson* in construing the words "without having been married" (in *Re Arden's Settlement* the

persons held to be entitled were the wife's issue by a subsequent marriage, and in *Stoddart* v. *Saville* there was no provision for the children of the marriage in default of appointment): *Hardman* v. *Maffett* (1884), 13 L. R. Ir. 499, where the words were "without having been married," and Porter, M.R., said there was no difference between them and "without ever having been married," and followed *Emmins* v. *Bradford: Re Deane's Trusts*, [1900] 1 I. R. 332, where the words were the same as in *Hardman* v. *Maffett*, and the same Judge followed his previous decision: *Re Smith's Settlement*, [1903] 1 Ch. 373, where the words were the same as in *Emmins* v. *Bradford*, and Swinfen-Eady, J., followed Jessel, M.R.: and *Re Brydone's Settlement*, [1903] 2 Ch. 84, where the words were "without having been married," and the Court of Appeal, following Jessel, M.R., and Swinfen-Eady, J. (and disapproving the contrary opinions of Fry, Chitty, Stirling and Kekewich, JJ.), held that no general rule was laid down in *Wilson* v. *Atkinson*, and that the words must bear their ordinary interpretation.

Children.

The primary meaning of the word "children" is descendants of the first degree.

But "according to the authorities, grandchildren and great-grandchildren are all children and come within that to certain purposes, and in *Crooke* v. *Brookeing* (1689), 2 Vern. 106 (a case on a will), it is said in the conclusion that it is allowed by all if no children are in being, grandchildren would come in under the word children, and may be thereby described:" per Hardwicke, C., *Wyth* v. *Blackman* (1749), 1 Ves. Sen. 196 at p. 201; S. C. *sub nom. Wythe* v. *Thurlston*, Amb. 555 (a case on a deed); but in that case the decision was that *issue* was not cut down by a subsequent reference to children. There does not appear to be any case on a deed in which remoter descendants have taken under the description of children; and Hall, V.-C., referring to the above stated opinion of Lord Hardwicke, said, "such a latitude of construction is not now adopted:" *Re Hopkins' Trusts* (1878), 9 Ch. D. 131 at p. 137 (a case on a will).

The cases on wills are collected in Theobald on Wills, c. 28, III. Legitimate Children, 2 (6th ed.), p. 290.

"Children of wife."

"Children of the wife," in a marriage settlement of the husband's property, means children of the wife by that husband: *Dafforne* v. *Goodman* (1699), 2 Vern. 362. "Younger children" in a settlement made, not in contemplation of marriage, by a widower,

who afterwards marries, includes his children by the second as well as the first wife: *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334.

"Younger children."

Ultimate trust in a marriage settlement in default of children of the marriage "for all and every the child and children or grandchild of Julia Gibson living at the decease of the survivor of the" husband and wife. *Held*, there being children of Julia Gibson living at that date, that no grandchild took any share, the grandchildren being a substitutional class to take only in the event of no child being alive at the period of distribution, and not being substituted for their own parents, as if the gift to children was a gift in joint tenancy: *Re Coley, Gibson* v. *Gibson*, [1901] 1 Ch. 40.

"Child and children or grandchild."

A limitation to, or trust for, children born or living at a given time, includes a child *en ventre* at that time and born afterwards: *Beale* v. *Beale* (1713), 1 P. Wms. 244.

Trust for children includes child *en ventre*.

In *Palmer* v. *Cracroft* (1706), 2 Vern. 578, where a posthumous son was excluded in favour of the next remainderman, it seems to have been decided that the contingent remainder to the child could not take effect owing to its becoming unsupported on the father's death, which, however, probably took place before the passing of the Statute mentioned below. The question was formerly considered doubtful with regard to settlements of realty, and an Act (10 & 11 Will. III. (1699), c. 16), was passed, by which it is enacted that where an estate is settled in remainder on children, with remainder over, a posthumous child may take as if it had been born in its father's lifetime, although there be no estate limited to trustees to preserve the contingent remainder. In *Millar* v. *Turner* (1748), 1 Ves. Sen. 85, where by marriage articles provision was made for "such child or children of the marriage as should be living at the death of the father or mother," a posthumous child was allowed to take its share.

10 & 11 Will. III. c. 16.

Limitations to, or trusts for, children born, or begotten, include those thereafter born or begotten; and *vice versâ*.

Born includes to be born and *vice versâ*.

"As *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before:" Co. Litt. 20 b.

"The words 'begotten and to be begotten' are the same, as

well upon the construction of wills as settlements, and take in all the issue after begotten:" per Lord Cowper, L.K., *Cook* v. *Cook* (1706), 2 Vern. 544.

"'*Procreatis*' takes in children to be begotten, and '*procreandis*' includes children then begotten:" per Parker, C., *Hewet* v. *Ireland* (1718), 1 P. Wms. 426 at p. 427.

"There are numerous authorities from those referred to in Co. Litt. 20 b, deciding that the word *procreandis* may be read *procreatis*, and *vice versâ*:" per Wood, V.-C., *Gabb* v. *Prendergast* (1855), 1 K. & J. 439 at p. 442.

Husband and wife, having issue a daughter, settled £600 in trust for the wife for life, remainder in trust for "such daughter or daughters as *shall* be begotten by the husband on the wife." The wife died without having had any other daughter. *Held*, that the daughter already born should take: *Hewet* v. *Ireland* (1718), 1 P. Wms. 426; 2 Eq. Ca. Ab. 139, pl. 9; Pre. Ch. 489; Gilb. Eq. 145. This appears to be the case reported in 10 Mod. 398, 2 Eq. Ca. Ab. 658, pl. 4, *sub nom. Slingsby* v. ——.

Limitations to use of settlor for life, remainder to his sons in tail, remainder to the settlor's brother for life, with remainder "to the heirs male of his body *hereafter* to be begotten." *Held*, that the brother took an estate tail, "the words hereafter to be begotten do not confine it to the issue born after, but will likewise take in that born before: the words *procreatis* and *procreandis* being of the same import. . . . And this was to prevent the great confusion which would otherwise be in descents by setting in the younger before the elder:" per Lord Talbot, C., *Hebblethwaite* v. *Cartwright* (1734), Cas. t. Tal. 31 at p. 32.

Context confining meaning.

The rule, however, is not inflexible, and may give way to a sufficient context.

Feoffment in fee to the use of the settlor's *younger* son in tail, and after to the use of the heirs of the settlor's body *in posterum procreandis*. He had at the time of the feoffment an elder and a younger son, and afterwards had issue a third son. The younger son died without issue. *Held*, that the third son took, "for this word *in posterum* is a forcible word to create a special inheritance, without that it had been a general tail:" per Wray, J., *Anon.* (1583), 3 Leon. 87, ca. cxxvi. "The case, therefore, did not turn entirely upon the effect of the words *in posterum procreandis*, for the feoffors passing by the eldest son in the first instance, was a very important circumstance to indicate an intention to exclude that son altogether:" per Lord Ellenborough, C., *Doe* v. *Hallett*

(1813), 1 M. & S. 124 at p. 136; and see per Stirling, J., *Locke* v. *Dunlop* (1888), 39 Ch. D. 387 at p. 398.

Children means legitimate children, unless that meaning is excluded by the circumstances or the context.

Children *primâ facie* means legitimate children.

Legitimate children include children born out of wedlock of persons who by subsequent marriage legitimatise the children, where, at the time of the birth of the children and of the marriage, the father is domiciled in a place where children born before marriage can be rendered legitimate by the subsequent marriage of the parents: *Re Goodman's Trust* (1881), 17 Ch. D. 266; *In re Grove, Vaucher* v. *Treasury Solicitor* (1888), 40 Ch. 216; but such children cannot take land in England by descent: *Doe* d. *Birtwhistle* v. *Vardill* (1840), 2 Cl. & F. 571; 9 Bli. N. S. 32; 7 Cl. & F. 895.

"A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heires males of his body. B. hath issue a bastard son; he shall not take the remainder, because in law he is not his issue, for *qui ex damnato coitu nascuntur inter liberos non computentur*:" Co. Litt. 3 b.

Illegitimate child if properly described can take.

But an illegitimate child can take an estate by deed if sufficiently described, though further described as the child of his reputed parents. "So if a remainder be limited to *Rich. filio Rich.* Marwood, it is good although he be a bastard, if in vulgar reputation and knowledge he be known by such name, as the book is in 39 Edw. III. (1365), 11a, and yet in truth he is *nullius filius*:" *Sir Moyle Finch's Case* (1606), 6 Rep. 63 a at p. 65 a.

Illegitimate children taking by context

There are no modern cases on deeds in which the question whether illegitimate children can take under the description of children, has arisen, except the case of *Gabb* v. *Prendergast*, where there was an ultimate limitation of realty in a marriage settlement upon trust for "all and every the child or children, as well those already born as hereafter to be born, of F. R. and E. his wife equally and their respective heirs and assigns." F. R. and E. were married at the date of the deed; they never had any legitimate children, but before their marriage E. had several illegitimate children who were living at the date of the deed, and who were reputed to be the children of F. R. *Held*, that such children took, Wood, V.-C., relying on the words "already born:" *Gabb* v. *Prendergast* (1855), 1 K. & J. 439.

The cases on wills are collected, Theobald, c. 28, I. Illegitimate Children (6th ed.), 279.

Limitation to unbegotten illegitimate child is void.

No limitation to, or trust for, an illegitimate child unborn (*quaere* unbegotten) at the date of the deed can take effect: Co. Litt. 3 b.

"If a man make a lease for life to B., the remainder to the eldest issue male of B., to be begotten of the body of Jane S., whether the same issue be legitimate or illegitimate. B. hath issue a bastard on the body of Jane S.; this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words, he could not take; and (as it hath been also said) a bastard cannot take but after he hath gained a name by reputation that he is the sonne of B., &c. And therefore he can take no remainder limited before he be borne, but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father is good:" Co. Litt. 3 b.

Lord Coke quotes in support of his opinion a case of *Blodwell* v. *Edwards* (1596), Cro. Eliz. 509; Noy. 35, Moore, 430, 2 Roll. Abr. 43–44. As to this case Hargrave says: "The several reports of the case cited by Lord Coke in the margin differ very much. According to Noy and Moore it was held by all but Popham that the remainder was good, though the bastard was not born till after creating it; and Rolle represents the case as if the opinion had been for the remainder. But Croke agrees with Lord Coke, and writes that a majority of the judges held the remainder void, though indeed it appears by his report that the party at length claiming as *lawful* issue, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard."

In *Re Shaw, Robinson* v. *Shaw*, [1894] 2 Ch. 573, North, J., says at p. 575: "It is conceded that, according to law, the rest"—*i.e.*, illegitimate children unbegotten at the date of the deed—"can take nothing, for the provision made was for illegitimate children, and they were not then even begotten."

It will be noticed that Lord Coke says that an illegitimate child, in order to take, must be *born*, but a limitation to an illegitimate child *en ventre* would be good if such child were described as the child of the mother, though it would probably be bad if the child was described as the child of the father, owing to the difficulty of an unborn child having a reputation of paternity. The only modern

case on the subject is *Re Shaw, Robinson* v. *Shaw*, [1894] 2 Ch. 573, in which case a man went through the ceremony of marriage with his aunt, and subsequently settled funds, subject to life interests of himself and his reputed wife, for the issue of the marriage of himself and his wife as she should appoint, and in default of appointment "for the child or children of the said 'wife' by the said W. S., her husband," and North, J., held that a child born within one month of the date of the settlement did not take the funds, though he said (p. 576) "no doubt there was a child then begotten in favour of whom a settlement might have been made if proper and apt words had been used; if the settlement had referred to a child already begotten and not born, for example, that might have been sufficient."

Issue means descendants.

The word issue *primâ facie* means descendants; but the context may show that it means children.

"It is clearly settled that the word 'issue,' unconfined by any indication of intention, includes all descendants. Intention is required for the purpose of limiting the sense of that word, restraining it to children only:" per Grant, M.R., *Leigh* v. *Norbury* (1807), 13 Ves. 340 at p. 344; and see per James, L.J., *Ralph* v. *Carrick* (1879), 11 Ch. D. 873 at p. 883; and per Jessel, M.R., *Morgan* v. *Thomas* (1882), 9 Q. B. D. 643 at p. 646 (both cases on wills).

"The law I take to be that 'issue' *primâ facie* means all descendants; but the word may, by the context, . . . get the meaning of 'children' and be so limited. The onus of proving that the word is used in that restricted sense lies upon those who assert that construction:" per Sullivan, M.R. (Ir.), *Re Denis' Trusts*, Ir. Rep. 10 Eq. 86.

Examples.

Voluntary settlement of real estate on the settlor for life, remainder to his nephew John for life; remainder to his sons successively in tail male; remainder to four persons (three of whom were the testator's sisters, and the fourth was his niece), and their heirs, on trust that they or the survivor, or heir of such survivor, should sell the premises; and that the money raised thereby might be equally divided between the four persons, or the respective issues of their bodies, in case they, or any of them, should be dead at the time of such failure of issue male of John, share and share alike, viz., to each of them, or their respective children, one fourth part thereof; provided that if any of them

should be dead without issue, when there should be such a failure of issue of John, then to be equally divided among the survivors or their respective children, in case any of them also should be dead, leaving issue of their bodies. John died without issue. At the time of his death none of the four persons named in the will was living. The niece had died without issue. Of one of the sisters there were children living; of another, children and great-grandchildren; of the third, only grandchildren. The contention was that the use of the word "children" restricted the meaning of the word "issue." But Lord Hardwicke came to the conclusion that, having regard to the fact that the testator must have contemplated that the ultimate trust might take effect after a long lapse of years, when it was more probable that grandchildren and great-grandchildren would be living than children, the word "issue" must be construed strictly as including the grandchildren and great-grandchildren: *Wyth* v. *Blackman* (1749), 1 Ves. Sen. 196; S. C. *sub nom. Wythe* v. *Thurlston*, Amb. 555. See the observations on this case in *Davenport* v. *Hanbury* (1796), 3 Ves. 257.

Bond given on marriage for payment to the husband within a limited time after the obligor's death, "if any of the issue of the marriage should be living at that time." The children of the marriage all died before the obligor, leaving grandchildren who were living at the time appointed for payment. *Held*, that the grandchildren were "issue" within the meaning of the bond: *Haydon* v. *Wilshere* (1789), 3 T. R. 372.

Settlement, on marriage, of personalty on husband for life, remainder (subject to payment of an annuity to the wife) to such persons as the husband should by deed or will appoint: in default, for his issue. He had no children by the marriage, but he had children and grandchildren by a former marriage. *Held*, that the children by that marriage and the grandchildren living at his death were entitled equally *per capita*: *Leigh* v. *Norbury* (1807), 13 Ves. 340.

J., by a voluntary settlement, "in order to make some provision for his daughter, M., the wife of T., and for her issue by T.," gave property on trust for M. for life, "and upon the decease of M., leaving issue by T., upon trust for such issue respectively;" M. had issue by T., one daughter only, who died in M.'s lifetime leaving children. *Held*, that such children were entitled as "issue;" *South* v. *Searle* (1856), 4 W. R. 470.

Where there was a power of appointment between the brothers and sisters "who shall be then living, and the issue of any one or

more of them as shall be then dead, leaving issue," with a gift in default of appointment to the same persons "equally to be divided among them as tenants in common, the issue of any deceased brother or sister to take only such share as such brother or sister would have taken in case he or she was then living, and the children of each deceased brother and sister, if more than one, to take in equal shares as tenants in common between themselves." *Held*, that "issue" was not confined to children: *Harrison* v. *Symons* (1866), 14 W. R. 959.

Post-nuptial settlement of personalty, made in pursuance of ante-nuptial agreement, on trust (subject to life interests to husband and wife), for "the issue of the marriage" as the wife should appoint; in default, as the husband should appoint; in default, for "the child or children of the marriage equally among them, and the issue of any of them who may have died leaving lawful issue, the whole issue of any one so dying receiving the share that would have belonged to their deceased parent." *Held*, that "issue" was to be taken in its proper sense: *Donoghue* v. *Brooke* (1875), Ir. R. 9 Eq. 489. See also *Re Howard's Trusts* (1858), 7 Ir. Ch. R. 344.

Issue restricted to children by reference to parent.

A reference to the "parent" of issue will generally suffice to show that "issue" means "children."

"I have always considered it as settled that in a will or in a deed, if it is a question whether the word *issue* shall be taken generally or in a restricted sense, a direction that the issue shall take only the share which their parents would have taken, if living, must be taken to show that the word *issue* was used in its restricted sense:" per Shadwell, V.-C., *Pruen* v. *Osborne* (1840), 11 Sim. 132 at p. 138.

By deed trusts of a fund were declared for the children of a marriage living at the death of the husband and wife, with a provision that if any should die in the lifetime of the husband and wife leaving issue, such issue should take such share as their parent would have been entitled to, in case he or she had survived the husband and wife. *Held*, that a grandchild of a child of the marriage was excluded: *Harrington* v. *Lawrence* (1814), cited *Pruen* v. *Osborne* (1840), 11 Sim. 132 at p. 138. To the same effect are *Tatham* v. *Vernon* (1861), 29 Beav. 604; *Barraclough* v. *Shillito* (1894), 32 W. R. 875; 53 L. J. Ch. 841.

Trust in remainder for twelve named persons, described as the children of A., or such of them as should be alive at a certain time, "and the issue of such of them as might be then dead leaving issue,

to be equally divided between them, share and share alike, but so as the issue of any deceased child should take between them no more than the parent would have taken if then living." *Held*, that "issue" meant children: *Anderson* v. *St. Vincent* (1856), 4 W. R. 304; 2 Jur. N. S. 607.

When issue restricted otherwise than by reference to parent.

It is difficult to lay down any rule as to what, other than a reference to parent, will cut down the meaning of "issue" to "children;" although slight indications of intention in marriage articles or a will suffice to show that "issue" is to be construed "children," this is not the case in a marriage settlement.

"The Court has often laid it down that marriage articles are to be treated only as a memorandum of instructions, which are to be carried out in such a way as to effect the intention of the parties. But the Court never deals in that way with an executed settlement: it always takes such an instrument as it finds it. With regard to wills the Court always looks at the intention of the testator, and adopts in practice, if not in theory, a much more benignant rule of construction:" per Pearson, J., *Re Warren's Trusts* (1884), 26 Ch. D. 208 at p. 217; and he accordingly held that a power of appointment in a marriage settlement for the benefit of issue was not restricted to children, notwithstanding that the trust in default of appointment, though referring to issue, was probably confined to children of the context.

But Christian, L.J., in *Re Dixon's Trusts* (1869), Ir. R. 4 Eq. 1 at p. 12, says, "When a testator by his will makes a gift or a limitation to the issue of another, there is nothing in the nature of the occasion of itself to suggest any restriction upon the presumptively indefinite signification of the word issue. But the reverse is the case when the instrument is a marriage settlement (which the recitals in this deed show that, though executed after marriage, it was in effect); for there the occasion itself, the very business in hand, suggests that 'issue' is used as a synonym for children. Why? Because the proper objects of a marriage settlement are the children of the intended marriage. Grandchildren or great-grandchildren are never thought of on such occasions, as objects of independent provision; portions are provided for the children, and they are thereby enabled, when their own turn comes to be married, to make provision for their children. But issue more remote than children are rarely, if ever, directly within the scope of a marriage treaty; and therefore it is that, in dealing with such an instrument, the very occasion suggests that if 'issue' be the word used, it is meant in the sense, to which it so easily lends itself, of 'children.' Thus

the very nature of the instrument helps to construe the word. Another clue is this—the constant association with 'issue' of the words 'of the marriage' or 'of him.' Thus, in the recitals, it is 'to make a provision for the said Anne, and the present and future issue of the said Anne, by him, the said Thomas William,' and again, 'in order to make a provision for the said Anne, and the issue of the said marriage'—and in the limitations themselves, the same form of expression is twice repeated, 'to and amongst the present and future issue of the said marriage.' Now, what is the force of those associated words? Plainly, to my mind, to particularise the sense of the word 'issue' to that of the immediate offspring of that particular marriage—the issue of the union of these two individuals, and not the issue of any other union; in other words, the children of these two." These remarks were approved in Ireland by Sullivan, M.R., in *Donoghue* v. *Brooke* (1875), I. R. 9 Eq. 489 at p. 497, and in *Re Denis' Trusts* (1875), I. R. 10 Eq. 81 at p. 89, and by Chatterton, V.-C., in *Harris* v. *Loftus* [1899], 1 I. R. 491 at p. 500: but were disapproved by Porter, M.R., in *Hobbs* v. *Tuthill* [1895], 1 I. R. 115 at p. 127.

Examples.

Lease for lives to A., her executors, &c. A. assigns for value to the use of B. for life, and afterwards to the use of his issue lawfully begotten, and for want of such issue over. *Held*, that issue meant children: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681.

Context.

By a marriage settlement a fund was settled (after the death of the survivor of the husband and wife) in trust for "the children then living," to be paid at twenty-one; and in case both the husband and wife should die "without leaving any lawful issue," then as the husband should appoint, and in default of appointment, "in case there should be no child or children as aforesaid," over. The children of the marriage all died in the lifetime of the husband and wife, leaving children who survived their grandparents. *Held*, that the gift over took effect: *Re Heath's Settlement* (1856), 23 Beav. 193.

A settlement of personalty contained trusts for the children as tenants in common, "the share or shares of such of the said children as shall be a son or sons to be considered as a vested and transmissible interest at his or their respective age or ages of twenty-one years, or dying under that age leaving lawful *issue* of his or their body or bodies lawfully begotten, living at his or their death or respective deaths, and of such of them as shall be a daughter or daughters at her or their like age or ages, or day or days of marriage, respectively, which shall first happen;" and a

covenant for the settlement of the after-acquired property of the wife upon trust for her for life, and afterwards "for all and every *the issue* of the marriage upon the same trusts," with a gift over in case no *child* or *children* should attain vested interests, &c. *Held*, that the word "issue" in the covenant meant children: *Marshall* v. *Baker* (1862), 31 Beav. 608.

Where a marriage settlement recited an intention to provide for "the issue of the said intended marriage," and the trusts, after the deaths of the husband and wife, were for the "issue of the said marriage" as the husband should appoint, and in default of appointment, for "such issue" equally; but if there should be no "issue" of said intended marriage, or in case all such "issue" should die under twenty-one or before marrying, then in trust for the survivor of the husband and wife, it was held that "issue" meant "children:" *Re Denis' Trusts* (1875), Ir. R. 10 Eq. 81.

By marriage settlement, a fund was settled in trust, after the deaths of the husband and wife, for the issue as the husband should appoint, and if there should be only one child living at the death of the survivor of the husband and wife, then in trust for such one child, with a gift over, if there should be no issue of the marriage living at the death of the husband. *Held*, that "issue" meant "children:" *Re Meade's Trusts* (1881), 7 L. R. Ir. 51.

"Male issue lawfully begotten."

Limitation in a voluntary settlement to the use of A. for life, remainder to the use of "the first male issue lawfully begotten by A. which should attain the age of twenty-one years, and to the heirs and assigns of such male issue for ever." *Held*, that "male issue" meant sons (stress was laid on the words "begotten by A.," and there were other expressions which helped this construction): *Hampson* v. *Brandwood* (1816), 1 Madd. 381, see p. 388.

"Issue male."

In a limitation to A. for life, remainder, after his decease, to his "issue male, and for want of such issue," to A. in fee, the words "issue male" were construed "sons:" *Fitzherbert* v. *Heathcote* (1771), cited in *Bayley* v. *Morris* (1799), 4 Ves. 788 at p. 794.

"Issues females."

Limitation in remainder to "issues females," of their bodies. *Held*, that daughters were meant: *Earl of Sussex* v. *Temple* (1698), 1 Ld. Raym. 310.

Issue restricted to children in one clause only.

Though "issue" may in one clause of a settlement mean "children," it does not necessarily follow that it is used in the same meaning in every clause: *Re Biron's Contract* (1878), 1 L. R. Ir. 258; *Re Warren's Trusts* (1884), 26 Ch. D. 208; but "I do not know whether it is law or a canon of construction, but it is good sense to say that whenever in a deed or will or other document you find that a word

used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where when used in another part of the document its meaning is not clear:" per Lindley, M.R., *Re Birks, Kenyon* v. *Birks*, [1900], 1 Ch. 417 at p. 418 (a case on a will).

"Child," "children," and "issue" are always words of purchase.

Children and issue always words of purchase

If a man give lands or tenements to a man *et semini suo*, or *exitibus vel prolibus de corpore suo*, to a man and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the statute provideth that *voluntas donatoris secundum formam in charta doni sui manifeste expressam de caetero observetur*, yet that will and intent must agree with the rules of law, and of this opinion was our author himself, as it appeared in his learned reading on this statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitime procreandis* or *semini suo* he hath but an estate for life for that there wanteth words of inheritance: Co. Litt. 20 b.

"First issue male" are words of purchase: *Lewis Bowles' Case* (1615), 11 Rep. 79 b.

"The word 'issue' in a will may be a word of limitation, but in a deed is always a word of purchase:" per Hardwicke, C., *Bagshawe* v. *Spencer* (1748), 2 Atk. 570 at p. 582; per Kenyon, C.J., *Doe* v. *Collis* (1791), 4 T. R. 294 at p. 299.

"Issue male" "would necessarily take as purchasers:" per Sugden, C., *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 17.

The reason for the rule is stated as follows in 2 Fearne, C. R. 249, s. 509:—

"In a deed no word except the word 'heirs' will pass an estate of inheritance, and hence the word 'issue' cannot there be a word of limitation. It is therefore a word of purchase in this case, because that is the only construction by which it can become operative, not because it is aptly a word of purchase."

Examples

Lease for three lives to A., her executors, &c. A. assigned to the use of B. for life, and afterwards of his issue lawfully begotten, and for want of such issue, over; B. died leaving a son and a daughter. *Held*, that they took the estate *pur autre vie* absolutely as joint tenants: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681.

Limitation to "issue" gives life estates

It follows that a limitation of real estate to "issue" gives life estates only: *Fitzherbert* v. *Heathcote* (1771), cited in *Bayley* v.

only in realty.

Morris (1799), 4 Ves. 788 at p. 794; *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 17; *Barron* v. *Barron* (1858), 8 Ir. Ch. R. 366.

"A. and his issue."

A limitation of realty to "A. and his issue," there being no issue alive at the date of the deed, gives a life estate to A., and the issue take nothing, even if the limitation is in remainder, and issue are born before it takes effect in possession: *Makepiece* v. *Fletcher* (1721), 2 Com. Rep. 457; *Wheeler* v. *Duke* (1832), 1 Cr. & Mee. 210; *Dawson* v. *Dawson* (1850), 13 Ir. L. R. 472.

Personalty

There does not seem to be a case of an immediate gift by deed of personalty to "A. and his issue," but it is probable that if there were no issue in existence, A. would take, and if there were issue in existence, A. and the issue then living would take jointly. The issue would take *per capita*, *Leigh* v. *Norbury* (1807), 13 Ves. 340, and jointly, *Davenport* v. *Hanbury* (1796), 3 Ves. 257.

Marriage articles.

As to the construction of "issue" in marriage articles, see *infrà*, Chapter on Executory Trusts.

CHAPTER XXV.

ELDEST SON—YOUNGER CHILDREN.

Eldest Son: Younger Children: Where Provision made for both, Eldest means succeeding to Provision for Eldest: Parents and Persons in loco parentis: Children of Second Marriage: Time at which Characters Ascertained: Eldest Son not taking Estate included: Eldest Son only Tenant for Life: Eldest Son who Disentails: Younger Child taking Estate excluded: Eldest Daughter taking Estate: Younger Child taking Estate, but not under Settlement, not excluded: If Provisions are made for Children Nominatim Rule does not apply: Interests indefeasibly Vested are not Divested: Where No Provision made for Eldest Child Younger Children has natural meaning: What Evidence sufficient to connect different Deeds so as to make Rule apply: Portions exceeding Value of Estate: "Besides" distinguished from "Other than."

Meaning of "eldest" and "younger."

"Eldest son."

THE words "eldest" and "younger" applied to individuals merely as living beings, without reference to property, office, title, or other like distinctions, must, of course, be taken to refer to the order of birth. Thus, in the limitations of an estate, the expression "eldest son" (*Bathurst* v. *Errington* (1877), 2 Ap. Ca. 698; *Meredith* v. *Treffry* (1879), 12 Ch. D. 170, both cases on wills), or "eldest child," or "*senior puer*" (*Lane* v. *Cowper* (1575), Moore 103; S. C. *sub nom. Lane* v. *Coups*, Ow. 64; *sub nom. Humfreston's Case*, Dy. 337 a; 2 Leon. 216, where a daughter was older than a son) means a first born son or child. But the persons to whom the words are applied may be placed in situations or under conditions in which the words would be sensible if they applied to position; the question then arises whether, from the context in which the words are used, they are to be referred to the difference in the age, or to that in the position, of the parties to whom they are applied. There are many familiar instances in which the words are applied to persons with relation to their office or situation; as where one

member of the bar is said to be "senior" or "junior," a junior peer, a puisne judge, and the like.

The cases show that on the one hand where provisions for younger children are made by an instrument which makes provision, or refers to or is shown by extrinsic evidence to be connected with provision made by the same settlor, for the "eldest child," the word "eldest" is used to designate the child who becomes entitled to the provision made for the eldest, even though he may not be the eldest in order of birth, and "younger" means other than such "eldest;" but that, on the other hand, where provisions are made for "younger children," by an instrument that does not make provision, or does not refer to or is not shown by extrinsic evidence to be connected with provision made by the same settlor, for the "eldest" child, the word "younger" is used in its literal meaning, *i.e.*, in reference to order of birth.

Where provisions are made by same settlor for eldest child and younger children, eldest means succeeding to provision for eldest.

In provisions made for younger children, by a deed which limits an estate to, or refers to or is shown by extrinsic evidence to be connected with an instrument made by the same settlor limiting an estate to, the eldest child, the phrase "eldest child" means "child succeeding to the estate;" and "younger children" mean "children not succeeding to the estate."

Rule applies to parents and persons *in loco parentis*.

In many of the cases this proposition is confined to deeds made by parents, or persons *in loco parentis*, with regard to whom it has been said, "Now what is the meaning of a person *in loco parentis*? I cannot do better than refer to the definition of it given by Lord Eldon in *Ex parte Pye* (1811), 18 Ves. 140, referred to and approved of by Lord Cottenham in *Powys* v. *Mansfield* (1837), 3 My. & Cr. 359 at p. 367. Lord Eldon says it is a person, 'meaning to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child.' Upon that Lord Cottenham observes, 'but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention of such person to assume also the duty of

providing for the child.' So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child:" per Jessel, M.R., *Bennet* v. *Bennet* (1879), 10 Ch. D. 474 at p. 477.

Therefore is of universal application.

It appears to follow that whenever a person other than a parent makes a settlement of an estate on an "eldest" child, and charges portions on it or otherwise makes a provision for the "younger" children, he has placed himself *in loco parentis* within the meaning of the rule, and hence that in every case where there are provisions made by the settlor for the eldest child and the younger children, the proposition must be applicable, since the provisions must be either made by a parent, or, if made by a person other than a parent, the mere fact of their being made in that form is of itself conclusive evidence that such person was *in loco parentis;* moreover, in referring to the limitation of the doctrine to cases where the provision is made by a parent or person *in loco parentis,* Lord St. Leonards, Sugd. Pow. (8th ed.), 680, says, "This distinction does not appear to be attended to at the present day." The proposition, therefore, is here stated as of universal applicability and not as confined to provisions made by parents and persons *in loco parentis.*

It is true that in *Sandeman* v. *Mackenzie* (1861), 1 J. & H. 613, Wood, V.-C., at p. 628, expresses some doubt whether the proposition is of universal applicability, but in the case before him it was not necessary to do so, as the eldest son was not provided for by, or by any instrument referred to by or connected with, the settlement which he had to construe.

"Younger children" includes children by subsequent marriages.

The expression "younger children" includes children by a subsequent marriage: *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334; *Butcher* v. *Butcher* (1812), 1 V. & B. 79 at p. 91; *Green* v. *Green* (1845), 2 Jo. & Lat. 529 at p. 541; 8 Ir. Eq. R. 473.

Time at which eldest child is ascertained.

The time at which the characters of eldest child and younger children are to be ascertained is the time at which the fund is to be distributed among the younger children, which may or may not be (though it generally is) the time at which the eldest succeeds to the estate.

"Every child except the heir is considered in equity as a younger; and eldership not carrying the estate along with it is considered not such an eldership as shall exclude by virtue of such clauses; and it would be hard that the right of eldership should be taken away, and yet not have the benefit of it as a younger child:" per Lord Hardwicke, C., *Duke* v. *Doidge* (1746), 2 Ves. Sen. 203, note, cited

by Wood, V.-C., in *Macoubrey* v. *Jones* (1856), 2 K. & J. 684 at p. 691.

"It is now well established law that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement, shall take any benefit from the portions. And that is so, whether the settlement does or does not contain an express provision to exclude him from a share in such portions:" per Wood, V.-C., *Macoubrey* v. *Jones* (1856), 2 K. & J. 684 at p. 690; cited with approval by Lord Cairns in *Collingwood* v. *Stanhope* (1869), L. R. 4 H. L. 43 at p. 61.

"The principle of the cases relating to settlements is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement), is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be the two beacons, or landmarks, by which the Court has directed itself in steering, sometimes, undoubtedly, a very difficult and doubtful course. That principle has led to this conclusion, that although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that, the family estate going to a younger son (which I also ought, indeed, to have mentioned as a leading part of that same system of exposition), the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children. That being so, it has been farther held that the Court will not, notwithstanding very strong words (as there have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And therefore it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution, or the portions provided for the children, is that period when the distribution itself is to take place.

Eldest child not succeeding to estate takes a portion.

Period of distribution.

Then, looking round, and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say, subsequent to the marriage of the parents, and holding in such case that the younger child has become entitled to a portion, nay, even though that portion may have been assigned to him, yet if, at the period of distribution, that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his; he takes the family estate, and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child:" per Lord Hatherley, C., *Collingwood* v. *Stanhope* (1869), L. R. 4 H. L. 43 at p. 52.

Time at which character fixed.

"This case depends upon the inquiry at what time the words of exclusion of the eldest son for the time being come into operation; that is to say, at what time the eldest son for the time being is to be looked for and ascertained. . . . The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception appear to me to attach at that time upon the son who then answers the description, and to exclude him from the class of persons interested:" per Lord Westbury, C., *Ellison* v. *Thomas* (1862), 1 De G. J. & S. 18 at p. 25. Similar observations will be found, per Maule, J., in *Scarisbrick* v. *Skelmersdale* (1840), 4 Y. & C. Ex. 78 at p. 113: *Tennison* v. *Moore* (1850), 13 Ir. Eq. R. 424.

"The period at which the rights of the parties are to be ascertained has been well and conclusively settled to be that at which the fund becomes distributable under the trusts:" per Bacon, V.-C., *Carter* v. *Earl of Ducie* (1871), 41 L. J. N. S. Ch. 153 at p. 157; 20 W. R. 228 at p. 230.

Eldest son not taking estate entitled to share in portions.

In the following cases an eldest child not succeeding to the estate was held entitled to a share under provisions for younger children.

Land was settled on A. for life, remainder to his first and other sons successively in tail male, remainder to B. in tail male, remainder to A. in fee, with power to A. to charge portions for younger children, sons and daughters, who should be living at his death. A. exercised the power in favour of his daughters and died, having had two daughters but no son. *Held*, that both daughters were entitled to portions. Harcourt, C., said, "Every one but the

heir is a younger child in equity, and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir; so here, the estate by the settlement goes all to the remainderman, who is *haeres factus*, and neither of the two daughters is heir, wherefore the elder daughter, having no more than the younger, is (as to this provision) a younger child, and consequently capable of taking it:" *Beale* v. *Beale* (1713), 1 P. Wms. 244.

Eldest son tenant for life only.

In *Ellison* v. *Thomas* (1862), 2 Dr. & Sm. 111; 1 De G. J. & S. 18, the eldest son was only tenant for life, with remainder to his first and other sons in tail; but Lord Westbury, C. (reversing the decision of Kindersley, V.-C.), held that the rule must be applied in his favour, so that, on his death without issue male, before the time of distribution, his executors were admitted to share in the provisions for younger children. Some importance was attached to the words describing the class of children intended to be provided for, viz., "children . . . other than and besides an eldest or only son for the time being entitled under or by virtue of a certain indenture of settlement bearing even date herewith to" certain estates. *Gray* v. *Earl Limerick* (1848), 2 De G. & Sm. 370, is *contra*, but cannot be relied on.

An estate was settled on a father for life, remainder to children as he should appoint, remainder to a trustee for a term for raising portions for younger children, remainder to the father's first and other sons successively in tail; the eldest son attained twenty-one and died without issue in the father's lifetime, and then the father appointed the estate to the younger son. *Held*, that the personal representatives of the eldest were entitled to a share under the provisions for younger children: *Davies* v. *Huguenin* (1863), 1 H. & M. 730.

Daughter.

Where the limitations of the estate extended to daughters, and a daughter (the only child, except a son who died in infancy) was married and died in the lifetime of the tenant for life, the M.R. in Ireland held that she was entitled to a portion as being "a child other than an eldest or only son," though she was an only child at her death, on the ground that her remainder was liable to be divested by the birth of a son: *Simpson* v. *Frew* (1855), 4 Ir. Ch. R. 428; but the decision was reversed on another point: (1856), 5 Ir. Ch. R. 517. And see *Stirum* v. *Richards* (1861), 12 Ir. Ch. R. 323, *infra*, p. 436.

Eldest son who has disentailed.

It need hardly be said that the doctrine under consideration will not be applied so as to give a share in the provisions for the

younger children to an eldest son, who at the time of distribution would have been entitled under the settlement to the estate, but who has barred the entail: *Collingwood* v. *Stanhope* (1869), L. R. 4 H. L. 43; *Re Fitzgerald's Settled Estates, Saunders* v. *Boyd*, [1891] 3 Ch. 394.

Younger child taking estate excluded from portions.

In the following cases a younger child succeeding to the estate was held not entitled to share in provisions for younger children.

A father on his marriage settled an estate on himself for life, with remainder to trustees after his death on trust to raise portions for his younger children, in such proportions as he should appoint, and in default equally, to be paid at their respective ages of twenty-one years, with remainder to his first and other sons successively in tail. The father appointed a sum to his second son, who was of full age at the time, and afterwards on the death of the eldest son without issue, and without having barred his estate tail, appointed the whole of the portions fund among the other younger children. *Held*, that the second son took nothing under the first appointment. "At the time of the appointment he was a person capable to take, and was a younger child within the power of appointing: but this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir:" per Wright, L.K., *Chadwick* v. *Doleman* (1705), 2 Vern. 528.

The branch of the rule by which a younger child becoming the eldest is excluded from the provision for younger children, was also applied in *Broadmead* v. *Wood* (1780), 1 Br. C. C. 77 (where an appointment had been made *nominatim* to a younger child, who afterwards became the eldest, and where the power expressly excluded "the eldest son, or the son possessing the estate"): *Teynham* v. *Webb* (1750), 2 Ves. Sen. 198 (where it does not appear from the report that any estate was settled on the eldest son, but the provisions for the younger children were, under the circumstances, construed with reference to provisions for the eldest son): *Gray* v. *Earl Limerick* (1848), 2 De G. & S. 370; *Ellison* v. *Thomas* (1862), 2 Dr. & Sm. 111; 1 De G. J. & S. 18; *Davies* v. *Huguenin* (1863), 1 H. & M. 730; and *Re Bayley's Settlement* (1871), L. R. 9 Eq. 491; L. R. 6 Ch. 590, in which case the real estate of the husband having been settled (subject to a life interest in the

husband), on the first and other sons of the marriage successively in tail male, the provisions for the younger children were made by a separate deed, in which the settlement of the husband's estate was recited, and the real estate of the wife was settled (subject to a life interest in her), "to the use of all and every the son and sons (other than an eldest or only son), and daughter and daughters of the marriage, in equal shares as tenants in common" in tail; and it was provided that if any such younger son or daughter should die, and there should be a failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before he or they should attain the age of twenty-one years, then the share of such son or daughter, as well original as accruing, should go to the survivor or survivors, or others, of the younger sons or daughters (if more than one) in equal shares, as tenants in common in tail, and if there should be only one such son or daughter, to him or her in tail; and it was held, that a younger son who, after attaining twenty-one, became in the lifetime of his mother an eldest son, was not entitled to a share of the wife's estate, since at the time of distribution he had ceased to be a member of the class "younger sons."

Rule applied to real estate settled in shares on younger children.

R. on his marriage settled real estate on himself for life, remainder to trustees for a term, remainder to the sons of the marriage successively in tail male, remainder to the sons of his second marriage successively in tail male, remainder to the daughters of the marriage successively in tail male, remainder to R. in fee. The trusts of the term were to raise 3,000*l.* for the portions of the daughter or daughters and younger son or sons of the marriage, if more than one daughter or younger son, the 3,000*l.* to be payable among them as R. should appoint, or in default equally; but if only one daughter or younger son who should not at R.'s death be his eldest son, then to raise a sum not exceeding 2,000*l.* for such only daughter or younger son payable as R. should appoint. R. had issue two daughters only. *Held*, that in the trusts of the portions term, "daughter" meant daughter not succeeding to the estate: *Stirum* v. *Richards* (1861), 12 Ir. Ch. R. 323; to the same effect is *Northumberland* v. *Egremont* (1759), 1 Ed. 435.

Rule applied to eldest daughter taking estate.

A younger child, who at the time of distribution is entitled to the estate, not under the original settlement by which, or by reference to which, provisions are made for the eldest child and younger children, but under

Child taking estate, not under settlement, not excluded.

subsequent dealings with the estate, is entitled to share in the provision for younger children.

Cases in which this rule has been applied are: *Spencer* v. *Spencer* (1836), 8 Sim. 87, where the eldest son and his father barred the estate tail, and resettled the property on the father for life, with remainder to the son in fee, and the son died intestate in the father's lifetime, so that the fee descended to the second son, who attained twenty-one, and died in his father's lifetime: *Tennison* v. *Moore* (1850), 13 Ir. Eq. R. 424, where the eldest son joined with his father in barring the entail and resettled the estate, and the second son who had become the eldest at his father's death, succeeded his father as tenant for life under the resettlement: *Macoubrey* v. *Jones* (1856), 2 K. & J. 684, where the eldest son and his father barred the entail, mortgaged the property, and resettled it in such a manner that the second son, who was the eldest at the time of distribution, became entitled to a share only of the estate: *Adams* v. *Beck* (1858), 25 Beav. 648, where the eldest son barred the entail, and devised the estate to uses, under which the second son had become entitled as tenant for life at the time of distribution: *Ex parte Smyth* (1861), 12 Ir. Ch. R. 487, and *Re Fitzgerald's Settled Estates, Saunders* v. *Boyd*, [1891] 3 Ch. 394. In all these cases, second sons or their representatives were held to be entitled to a share in the provisions for the younger children, notwithstanding that the second sons had become entitled to the estate or some part thereof. *Wakefield* v. *Richardson* (1883), 13 L. R. Ir. 17, is a case where the point was raised (see p. 32), and seems to have been conceded. The case of *Peacocke* v. *Pares* (1838), 2 Keen, 689 (where the facts were similar to those in *Adams* v. *Beck* (1858), 25 Beav. 648, and it was held that the younger son who succeeded to the estate was not entitled to any provision as a younger child), must be considered to be no longer law.

Child taking under exercise of general power.

Where under a power in a marriage settlement, uses are revoked and new uses declared, under which a younger child, who becomes the eldest at the time of distribution, takes, through the mere bounty of his parent, property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to a portion as a younger child: *Wandesforde* v. *Carrick* (1871), Ir. R. 5 Eq. 486; see p. 497, where Chatterton, V.-C., said, "the plaintiff has become possessed of the settled estates as tenant for life, and of course if they were taken by him under the limitations of the settlement of 1812, he

would have ceased to be entitled to a younger child's portion. But in my opinion he has not taken any estate under that settlement in such a sense as that he should be deemed an eldest son. Anne, Lady O., revoked the uses which constituted that instrument a settlement of the estate, and thus destroyed the settlement. . . . She then proceeds as a matter of bounty to devise the lands as her own property. The plaintiff no longer takes under the limitations of the settlement or as a child of the marriage, what he has taken cannot be deemed a portion or provision under that instrument, and it is therefore not within the principle on which this Court deals with such cases."

Where provisions made *nominatim*.

Apparently, where provisions are made for the younger children, or the eldest child is excluded, *nominatim*, the rule does not apply.

Provision was made by a father under a private Act of Parliament for his eldest son John, and power was given to the father to appoint a sum among "Stephen the son, Martha and Catherine the daughters of Stephen Jermyn the father, and the survivors or survivor of them, and such other child and children as the said S. Jermyn the father should hereafter have." The eldest son died without issue; then the father appointed in favour of Stephen. *Held*, that he was an object of the power. Lord Talbot, C., said, "Stephen is indeed called a younger child in the preamble; but when the power of appointment is given, it is not to appoint amongst the younger children generally, but to Stephen, Martha, and Catherine:" *Jermyn* v. *Fellows* (1735), Ca. Temp. Talb. 93. Lord St. Leonards, in his comments on this case (Sug. Pow. (8th ed.) 679), says, "The case seems to establish this principle, that where a younger child is included by his *name* in a power, he will continue an object of the power, although he lose his character of younger son." But he points out that Lord Talbot distinguished the case from *Chadwick* v. *Doleman* (1705), 2 Vern. 528, on the ground that there the question was between a younger son who had become the eldest and the other younger children, while in *Jermyn* v. *Fellows* it was between the only surviving child and the administrators of a deceased child, "so that this case," he says, "cannot perhaps be relied on as an authority for the general principle which at first sight it seems to establish." And see *Savage* v. *Carroll* (1810), 1 Ball & B. 265, where Lord Manners, C. (at p. 278), distinguished *Jermyn* v. *Fellows*, saying, "As to the fact of the younger children being enumerated by name in that case and the same circumstance occurring here, I do not think any weight is to be

attached to it; for here the mother was dead and all the children to take were ascertained."

By a marriage settlement a husband covenanted to pay 10,000*l.* for the children of the marriage, and for want of such children, for the children of the wife by a former marriage, other than A. her eldest son, as the husband should appoint, and in default, for all such children, except as aforesaid, who should attain twenty-one, equally, and if only one, except as aforesaid, then in trust for such one younger child; the eldest son attained twenty-one, and died in his mother's lifetime; there were no children of the second marriage. *Held*, that the executors of the second son, who on the death of his brother succeeded to the family estates, and attained twenty-one and died in his mother's lifetime before the period of distribution were entitled to a share: *Sandeman* v. *Mackenzie* (1861), 1 J. & H. 613. And see *Wood* v. *Wood* (1867), L. R. 4 Eq. 48; *Re Prytherch, Prytherch* v. *Williams* (1889), 42 Ch. D. 590 (both cases on wills).

Interests indefeasibly vested before time of distribution are not divested.

Of course, if it clearly appear from the deed that the interests of the younger children are to vest indefeasibly at a time other than that of distribution, an interest once vested will not be divested: *Windham* v. *Graham* (1826), 1 Russ. 331. See the comments on this case in *Re Bayley's Settlement* (1870), L. R. 9 Eq. 491; L. R. 6 Ch. 590.

Stock settled upon trust for children (except an eldest son entitled to settled estates), in equal shares, shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage. There were two children, a son, who died an infant, and a daughter who married (before her brother died), and became on her brother's death, entitled to the settled estates. *Held*, that the daughter took an absolutely vested interest in the stock: *Carter* v. *Earl Ducie* (1871), 41 L. J. N. S. Ch. 153; 20 W. R. 228, where Bacon, V.-C., said that the daughter took on her marriage a vested interest in the whole fund, and he referred to the rule that an estate once vested is not to be divested but by plain express words. The circumstances and terms of the deed in this case were somewhat peculiar, and if it had been held—as was contended for—that the daughter taking the estates was to be considered as "an eldest or only son," still on the terms of the settlement, an only son would have taken both the estates and the settlement fund.

Where no provision is made for eldest child, younger

In provisions made for younger children by a deed which does not limit an estate to, or does not refer to, or is not shown to be connected with, an instrument

has natural meaning.

limiting an estate to, the eldest child, the words "eldest" and "younger" have reference to priority of birth.

In these cases the time at which the characters of eldest child and younger children are in general to be ascertained is the time of vesting.

Trust in a settlement of stock to pay the income of a fund to M. for life, and at her death "to pay or transfer the stock to all her children, except her eldest or only son, in equal shares, at their respective ages of twenty-one years." A younger son attained twenty-one and then became the eldest by the death of his elder brother before the time of distribution. *Held*, that his share was not divested: *Re Theed's Settlement Trust* (1857), 3 K. & J. 375; *Sandeman* v. *Mackenzie* (1861), 1 J. & H. 613.

A sum of money was settled on marriage on trust for the husband (a baronet) and wife and the survivor for life, and then to transfer among all the children equally except an eldest or only son, the shares of sons to vest at twenty-one and the share of any child who died before the period of vesting to accrue for the benefit of the others, except an eldest or only son. There were six sons: the first and last born died infants; the second attained twenty-one and succeeded his father in the title but died without issue before the period of distribution; the third and fourth sons attained twenty-one and died without issue; the fifth attained twenty-one and succeeded his brother in the title, and was living at the period of distribution. *Held*, that the second son was the "eldest son" within the meaning of the settlement, and as such was to be excluded from any share, but the fifth son was entitled to take a share: *Re Rivers* (1870), 40 L. J. N. S. Ch. 87; 19 W. R. 318. The reports differ as to whether the fifth son took any interest in the family estate, and as the decision turned on the precise words of the settlement, which were very special, the case is not of much general importance.

A. by deed appointed a sum of money in trust for his daughter B. for life, with remainder "in trust for the child, if only one, or all the children, except an eldest or only son, if more than one," of B., who, either before or after the determination of the previous trusts, should attain twenty-one or marry, and if more than one, equally. A. died; then B.'s eldest son C. attained twenty-one and died; then B. died, leaving her second son D., who had attained twenty-one, and a daughter. At the date of the deed, certain estates stood limited, by a settlement to which A. was a party,

to the use of B.'s husband for life, with remainder to his sons by B. successively in tail. *Held*, that, as the provisions were not by a father, and as there was no reference in the deed of trust to the settlement of the estate, and there was nothing to show that A. had the settlement in his mind at the time of the appointment except that he was a party to it, the phrase "eldest son" meant eldest son at the time of vesting, so that D. who had subsequently to that time become the "eldest son" took a share in the fund: *Domvile* v. *Winnington* (1884), 26 Ch. D. 382.

What evidence sufficient to connect deed providing for eldest child with deed providing for younger children.

It is impossible to say what evidence is sufficient to connect a deed, by which provision is made for "younger children," with another instrument by which provision is made for an "eldest son," but not referred to in such deed, so as to bring the case within the rule. In *Teynham* v. *Webb* (1750), 2 Ves. Sen. 198, where the rule was applied, the nature of the evidence is not stated; in *Sandeman* v. *Mackenzie* (1861), 1 J. & H. 613, where the rule was not applied, there is no statement how the eldest son took; in *Domvile* v. *Winnington* (1884), 26 Ch. D. 384, where the rule was not applied, the mere fact that the settlor was a party to the deed under which the eldest son took the estates was held insufficient to make the rule applicable.

Where portions exceed whole value of the estate.

The fact that, owing to a change in the value of the estate charged with the portions, the amount of the portions exceeds the value of the residue of the estate will not entitle a younger son becoming the eldest to claim a portion: *Reid* v. *Hoare* (1884), 26 Ch. D. 363.

"Besides;" "other than."

Where provisions are made for children "besides" an eldest son, no children take unless there is a son; while, if the provisions be for children "other than" an eldest son, the younger children take whether there is a son or not: *Walcott* v. *Bloomfield* (1843), 4 Dr. & War. 211 at p. 235; 6 Ir. Eq. R. 227; cited and discussed in *Simpson* v. *Frew* (1856), 5 Ir. Ch. R. 517 at p. 525.

CHAPTER XXVI.

VESTING OF GIFTS TO CLASSES.

Vest defined: Class defined: Gift to Class and A. where A. is a Member of it: Where A. is not a Member of it: Composite Class: Immediate Gift to Class: To "A. and his Eldest Child": Gift in Remainder to Class: Vesting notwithstanding Existence of Power: Implied Interest in Default of Appointment: Where Appointment Testamentary only.

THIS chapter contains the general rules as to vesting of gifts to classes applicable to deeds of every nature; the special rules applicable to portions charged on land and to settlements of personalty made by a parent or a person *in loco parentis* are collected *infra* Chapter on Portions.

Meaning of vest.

The meaning of the word "vest" is discussed in Fearne, C. R. 1; and Hawkins on Wills, p. 221 *et seq.*, where it is observed that "the only definition that can be given of the word 'vested' in English law, as applied to future interests other than remainders, is, that it means 'not subject to a condition precedent.'"

The rules as to the vesting of real estate are fully discussed in Fearne, C. R.; and are therefore only incidentally referred to here.

Meaning of class.

The meaning of the word "class" has been much discussed, but always in cases on wills. The cases are collected in Lord Davey's speech, in *Kingsbury* v. *Walter*, [1901] A. C. 187, in which speech are contained examples of what are classes within the ordinary meaning of the word, and what have been held to be such on the context in special cases. Lord Davey says (p. 192): "*Primâ facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relationship to the testator. That definition is in accordance with that given by Lord Selborne in the case referred to in North, J.'s, judgment: *Pearks* v. *Moseley* (1880), 5 Ap. Ca. 714; and by Lord Hatherley, then Wood, V.-C., in a case which has also been

Class consists of persons comprehended under general description.

referred to at the Bar: *In re Chaplin's Trust* (1863), 33 L. J. Ch. 183. But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made 'to all my nephews and nieces, including A.,' or if a gift is made 'to C. and all other my nephews and nieces,' each of those would be a class gift. *Stanhope's Case* (1859), 27 Beav. 201, is an example; there the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty, J., *In re Jackson* (1883), 25 Ch. D. 162, where the gift was to five named individuals, and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty, J., held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. . . . There may also be a composite class, such as, for instance, children of A. and children of B.; that would be a good class. On the other hand, a gift to A. and all the children of B. is, in my opinion, *primâ facie* not a class gift, and I think that has been so decided, and rightly decided, in the case of *In re Chaplin's Trust* (1863), 33 L. J. Ch. 183, which I have already referred to, and also in a case before Sir George Jessel of *In re Allen, Wilson* v. *Atter* (1881), 29 W. R. 480; 44 L. T. N. S. 240. There was in that case a direction 'to divide equally amongst all the children of R. W., the child of W. W. and L., his wife, and A. W., the widow of J. W., share and share alike.' It was held that this was not a gift to a class, and that the share lapsed. . . . I think those cases were rightly decided, and I do not agree with the proposition, which I understand to be laid down by Romer, L.J., who says: 'In my opinion it is correct to say that a gift by will to a class properly so called, and a named individual such as A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is *primâ facie* a gift to a class.' I think that that is contrary to the established authorities and to the principles applicable to this branch of law. But, my Lords, it is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift. I think the same result may be arrived at if the Court, putting itself into the same position as the testator occupied, with the same knowledge as the testator had

Some individuals may be named.

Composite class, as children of A. and children of B.

A. and children of B. not a class,

but may by context be a class.

when he was writing his will, comes to the conclusion that the gift, although expressed in the form of a gift to an individual and the children of A., was intended to operate as a class gift. There is abundant authority for that proposition. I will only mention two cases before Lord Romilly. The case of *Aspinall* v. *Duckworth* (1866), 35 Beav. 307, appears to me to be exactly this case. It was a gift unto and equally amongst the testator's nephew A. and the children of his sister B. as tenants in common. Lord Romilly held that that was a gift to a class. . . . Another principle which is, I think, established in this branch of the law, is that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A. for life, and afterwards to B., and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life. My Lords, it is, I conceive, on that ground that the other case to which I referred, namely, *Drakeford* v. *Drakeford* (1863), 33 Beav. 43, 48, was decided. The learned judge, Lord Romilly, there said that the gift which he had before him in that case was not a class gift. It was in this form—a gift to A. for life, and at his death to be equally divided between his surviving children and the testator's niece, R. W. There, as your Lordships see, only those children who survived the tenant for life would have taken, whereas R. W.'s interest would have become vested at the testator's death. On that ground Lord Romilly held that it was not a class."

Class must take in interest at same time.

A class is not the less a class because a particular member is excluded.

Some individuals may be excluded.

If the class be what Lord Davey in the above passage calls a composite class, *i.e.*, a class consisting of the children of A. and the children of B., or what he holds is a class only in special circumstances, *i.e.*, a class consisting of an individual and the children of A.—

> The members of a composite class, or an individual and the members of a class, take *per capita*: *Fletcher* v. *Fletcher* (1882), 9 L. R. Ir. 301.

Members of composite class, or individual and class, take *per capita*.

With regard to the persons to take under limitations to, or trusts for, a class, it may be laid down that—

> An immediate provision for persons forming a class, as "children," or "issue," vests in those only who are

Immediate gift to class vests only

in existence at the date of the deed, unless the contrary is expressed, and as joint tenants.

in those then alive.

B., having divers sons and daughters, A. giveth land to B., *et liberis suis, et a lour heires*, the father and all his children do take a fee simple jointly by force of these words 'their heirs;' but if he had no child at the time of the feoffment, the child born afterwards shall not take:" Co. Litt. 9 a.

"In all grants of estates in lands there must be a person *in esse* to take at the time the estate vests by the grant; therefore, in case of a feoffment to one and his children and their heirs, if he has children at the time, the father and all his children take jointly in fee; but if he has no child, the father alone takes; an afterborn child cannot take, for the gift was immediate:" per Downes, C.J., *Crone* v. *Odell* (1811), 1 Ball. & B. 449 at p. 458.

Demise to A. and B., his wife, *et eorum primogenitae proli successive:* they had then no issue, but afterwards had issue. *Held*, that after the death of A. and B., the issue could take nothing, as he was not *in esse* at the time of the grant, and by the grant he was to take jointly: *Stevens* v. *Lawton* (1587). Cro. Eliz. 121: S. C. *sub nom. Stephen's Case*, Owen, 152.

Immediate trust "for the children of A., who at that time had three children and now hath six." *Held*, that the trust fund belonged to the three only: *Warren* v. *Johnson* (1673), 2 Rep. in Ch. 36.

"To A. and his eldest child."

It has been thought that a limitation to "A. and his eldest child," gave an estate in remainder to the child if he was not born at the date of the limitation: see per Saunders, Serj., *arguendo*, *Colthirst* v. *Bejushin* (1551), Plowd. 21 at p. 29 a; per Mounson, J., in *Brent's Case* (1575), 2 Leon. 14; and per Houghton, J., *Tyler* v. *Fisher* (1620), Palm. 34; but this is erroneous (see the *Prior of Grimesby* v. *B.*, Y. B. 17 Edw. III. (1343), 29, pl. 30; Y. B. 18 Edw. III. (1344), 59, pl. 91; 2 Roll. Abr. 417, pl. 8), for if the child had been *in esse* at the time, he would have taken jointly, and as he was incapable of doing so, he could take nothing: *Shelley's Case* (1581), 1 Rep. 93 b at p. 101 a.

Rule applies to appointments.

The rule applies to a class to take by way of appointment.

Demise to a husband, his wife, "and their children at the assignment of the husband." There was but one child at the date of the lease, but afterwards others were born. The wife died in the lifetime of the husband. The husband assigned to a child born after the date of the deed. *Held*, that he took no interest: *Cole & Friendship's Case* (1584), 1 Leon. 287.

Gift in remainder to class vests in all alive when it falls into possession.

A provision by way of use of realty, or by way of trust of realty or personalty, in remainder to persons forming a class, as "children," or "issue," vests in those who are in existence at the date of the deed, subject to opening and letting in all who come into existence before the remainder falls into possession: and if none are in existence at the date of the deed, it vests in the first who comes into existence, subject to opening and letting in all who come into existence before the remainder falls into possession.

It used to be thought that children born after the date of the deed could not take; thus when A. levied a fine to the use of B. for life, and after to the use of the children of C., *procreatis:* C., at the time of the fine, had two sons, and before the death of B. had two daughters, it was held that the daughters could not take: *Frederick* v. *Frederick* (1594), Cro. Eliz. 334; but this case must be considered as overruled.

Realty.

Limitation in remainder "to the use of the issues female of the body of A. and the heirs of their bodies," A. having then no daughter. *Held,* that all the daughters of A., born before the expiration of the prior limitations, took as joint-tenants for life, with several inheritances: *Matthews* v. *Temple* (1698), Comb. 467; S. C. *sub nom. Earl of Sussex* v. *Temple,* 1 Ld. Raym. 310.

By marriage settlement lands were settled upon the husband for life, with remainder to the issue of the marriage, in such shares, &c., as he should appoint, and in default of appointment, to the issue, share and share alike. *Held,* that the several children of the marriage, as they respectively came into existence, took immediate vested interests, liable to be divested by an exercise of the power: *Heron* v. *Stokes* (1842), 2 Dr. & War. 89; 1 Con. & L. 270; 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284.

Leaseholds.

Trust of leaseholds in a marriage settlement, after the deaths of the husband and wife, for the children as they should appoint, and in default of appointment for all the children equally. *Held,* to be a vested remainder, which opened to let in the children as they came into being: *Lawrence* v. *Maggs* (1759), 1 Ed. 453.

W. and G. (two brothers) being absolutely entitled (in certain events which happened) as tenants in common to leasehold houses, by deed, made in 1840, assigned the premises to S. upon trust for M. for life; and after the death of M., to the use of S.; and after the

death of S., in trust for the children of W. and G. "respectively," in such shares as they or either of them might appoint; and in default of appointment, then to and amongst the said children equally and share alike. W. by will, purported to appoint all the premises to his then only child W. F., and died in 1869 without leaving any other child surviving. G. died, leaving several children and without making any appointment; and M. and S. also died. *Held* (affirming the decision of the Court below), that the children of both W. and G. living at the date of the deed of 1840, and subsequently born were the objects of the non-exclusive power, and also the objects to take in default of appointment; and that, there having been only an exclusive exercise of the power, all such children became entitled; and that they took *per capita: Fletcher* v. *Fletcher* (1882), 9 L. R. Ir. 301, on app. from 7 L. R. Ir. 40.

Personalty.

Marriage settlement of personalty on trust for the wife for life, remainder for her children as she should appoint, and in default of appointment for the children equally. *Held*, that the interests of the children vested at birth, liable to be divested by an appointment: *Gordon* v. *Levi* (1758), Amb. 364; *Vanderzee* v. *Aclom* (1799), 4 Ves. 771.

Realty and personalty mixed.

Covenant on marriage by the husband to settle, all the real and personal estate, of which he should die seised or possessed, on his wife, if surviving, for life, with remainder, after the death of himself and his wife, for all the children of the marriage equally. *Held*, that all the children became entitled to vested interests on coming into existence: *Nayler* v. *Wetherell* (1830), 4 Sim. 114.

Gift by direction to pay to, &c.

This and the previous rule apply where the provision for the children is effected by a direction "to pay:" *Vanderzee* v. *Aclom* (1799), 4 Ves. 771; "to pay, apply, or dispose of;" *Re Minor's Trust* (1860), 28 Beav. 50; "to transfer, assign, and make over:" *Jopp* v. *Wood* (1865), 2 De G. J. & S. 323; or "to divide among:" *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151.

Gift confined to members of class living when remainder falls in.

The limitation or trust may of course be confined to such of the persons forming the class as shall be living when the remainder falls into possession: *Re Edgington* (1855), 3 Drew. 202; *Re Wollaston's Settlement* (1860), 27 Beav. 642.

Vesting under express limitations in default of appointment.

The existence of a power of appointment does not prevent interests, taken under express limitations in default of appointment, from vesting until and in default

of appointment. See per Kindersley, V.-C., *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151 at p. 155.

In *Leonard Lovie's Case* (1614), 10 Rep. 78 a, at p. 85 a; S. C. *sub nom. Prowse* v. *Worthinge*, 2 Brownl. & G. 103, it was erroneously decided that the interests taken in default of appointment were contingent; and the same view was originally taken by Lord Hardwicke, C., in *Walpole* v. *Conway* (1740), Barn. Ch. 153; but in *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174, he appears to have altered his opinion; see per Lord Kenyon, C.J., *Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39 at p. 64, and *Doe* d. *Tanner* v. *Dorvell* (1794), 5 T. R. 518 at p. 521.

"Nothing is better settled than that where there is a power of appointment to a class, and in default of appointment over to that or another class, this class takes a vested interest, subject to be divested by appointment. There was some doubt upon this in several cases; but the rule was settled by *Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39;" per Sugden, C., *Heron* v. *Stokes* (1842), 1 Con. & L. 270 at p. 283. "The rule is settled that no gift over on a contingency can prevent the previous estate from vesting. If the contingency happens the prior vested estate will be divested:" per Sugden, C., *Heron* v. *Stokes* (1842), 2 Dr. & War. 89 at p. 115. "It is the clear and settled law of the land that a gift in default of appointment gives vested interests to all the objects of the power, subject to be divested by its exercise:" per Sugden, C., *Heron* v. *Stokes* (1842), 4 Ir. Eq. R. 284 at p. 285, and see at pp. 297, 298, on appeal from 3 Ir. Eq. R. 163.

Realty.

Money by marriage articles to be laid out in land to be settled, subject to life interests of husband and wife, for the children as they should appoint, and in default of appointment equally, if one to that one in tail. There was but one daughter. *Held*, that she took a vested estate tail: *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174.

Limitation in marriage settlement to use of wife and husband successively for life, remainder to the use of all and every the child or children of the marriage for such estates, &c., and in such parts, &c., as the husband and wife should by deed, or as the survivor of them should by deed or will appoint, and in default to the children equally as tenants in common in fee. *Held*, that the interests in default of appointment were vested: *Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39; *Doe* d. *Tanner* v. *Dorvell* (1794), 5 T. R. 518; *Smith* v. *Camelford* (1795), 2 Ves. Jun. 698; *Cox* v. *Chamberlain* (1799),

4 Ves. 631 at p. 636; *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281; *Osbrey* v. *Bury* (1808), 1 Ball & B. 53; *Heron* v. *Stokes* (1842), 2 Dr. & War. 89; 1 Con. & L. 270; 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284.

Personalty.

Term created under a power to raise money for all and every the children of T. in such parts, shares, and proportions as T. should appoint, and in default equally. T. never appointed. *Held*, that the children took vested interests: *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198; *Gordon* v. *Levi* (1758), Amb. 364, where the marginal note is incorrect; *Cholmondeley* v. *Meyrick* (1758), 1 Ed. 77; *Lawrence* v. *Maggs* (1759), 1 Ed. 453; *Mostyn* v. *Mostyn* (1844), 1 Coll. 161; *Rooke* v. *Rooke* (1761), 2 Ed. 8; *Hynes* v. *Redington* (1844), 1 Jo. & Lat. 589; 7 Ir. Eq. R. 405, the two last-mentioned cases being cases on marriage articles.

Where power is by will only.

Even if the power is to appoint by will only, the rule as to vesting until and in default of appointment is the same.

By post-nuptial settlement freeholds were conveyed to trustees, on trust to pay the rents to A. and his wife during their respective lives, and after the death of the survivor, to sell and divide the proceeds among all and every the children of A. in such shares and proportions as he should by will appoint. *Held*, that the property was vested in all the children, subject to be divested by an exercise of the power, and that, the power not having been exercised, the representatives of a deceased child were entitled to his share: *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151.

Implied trust in default of appointment.

Where there is a power of appointment among a class, but no express trust in default of appointment either for that class or for any other class or individual, or there is such a trust to arise only on failure of objects of the power, there is implied, in default of appointment, a trust for the class of persons who are capable of taking under an appointment in pursuance of the power; and the members of such class take vested interests until and in default of appointment as tenants in common: *Re Susanni's Trusts* (1877), 47 L. J. N. S. Ch. 65; *Wilson* v. *Duguid* (1883), 24 Ch. D. 244.

"The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A. to appoint in

what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it as he may think fit among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it:" per Kindersley, V.-C., *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151 at p. 155.

Settlement of leaseholds on trust for husband and wife for their lives, and if they should have issue then, after the decease of the survivor, to go to such issue, in such proportion, manner, and form as they or the survivor should appoint; the wife survived the husband; there was one child only, who died before the wife; no appointment was made. *Held*, that the child took: *Madoc* v. *Jackson* (1789), 2 Br. C. C. 588; *Fenwick* v. *Greenwell* (1847), 10 Beav. 412.

Trust in remainder for C. for life, and after his decease on trust to assign amongst such of his children, and in such manner, shares, terms, and proportions, as he should by any writing appoint. C. died without exercising his power, having had several children. Three of them died before him, two after him and before the determination of the interests prior to C.'s life interest. *Held*, that all C.'s children took vested interests: *Wilson* v. *Duguid* (1883), 24 Ch. D. 244.

Power testamentary only.

It follows that where the power is to appoint by will only, none but persons who survive the donee of the power form the class and are capable of taking under the implied gift in default of appointment: *Sinnet* v. *Walsh* (1879), 5 L. R. Ir. 27; and consequently interests under the implied gift are defeasible on death before that of the donee of the power.

Settlement of fund after the deaths of A. and B. for such descendants of C. as B. should appoint by will. *Held*, power in the nature of a trust for descendants of C. living at B.'s death, entitling such descendants in equal shares as tenants in common in default of appointment, and that an appointment to the legal personal representatives of descendants of C. who died before B. was unauthorised: *Re Susanni* (1877), 47 L. J. N. S. Ch. 65.

Of course, the class may, even where the power to appoint is not only by will, be expressed to be surviving children, and in that case

only children who survive are members of the class: *Winn* v. *Fenwick* (1849), 11 Beav. 438; 18 L. J. Ch. 337. See, however, the remarks of Kindersley, V.-C., on this case in *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151 at p. 159.

Express gift in default of exercise of power.

If there is an express gift over in default of any exercise of the power (not in default of objects of the power) to persons other than the objects of the power, such express gift of course prevents the implication of a gift to such objects: *Jenkins* v. *Quinchant* (1757), 5 Ves. 596, note; see at p. 601.

Where a term was limited to raise for portions such sums, not exceeding 1,000*l.*, as the husband should appoint to be divided as the husband should appoint, and in default equally, it was held by Brady, L.C., that no portion was raisable unless the husband made an appointment: *Simpson* v. *Frew* (1856), 5 Ir. Ch. R. 517, reversing 4 Ir. Ch. R. 428.

CHAPTER XXVII.

PORTIONS.

Sums charged on Rents and Profits are charged on Corpus: Rent Charges charge Corpus: Sums payable at Fixed Time carry Interest: Portions charged on Land vest at Twenty-one or Marriage if no Time fixed for Payment: Portions charged on Rents only vest when Rents become applicable: Portions charged on Land payable on Event personal to Portionist do not vest previously: Postponement of Payment for Convenience of Estate has no effect on Vesting: Contingent Portions charged by Parents carry Interim Maintenance: Contingent Portions only raised if Contingency happens: Personalty Portions vest at Birth: If Trust created by direction to pay on Event personal to Portionist Portions vest on Event happening: Gift of Interim Interest does not accelerate Vesting: Divesting Clauses applied to Vesting not Payment: Unless Issue of Child dying before Payment take originally or by substitution: "Leave" read "have": All take if One survives: Recapitulation.

Portions and charges are generally charged on the *corpus* of the land out of which they are to be paid, but it sometimes happens that they are charged on rents only; when this is the case—

Charge on rents and profits is a charge on *corpus*.

> A trust to raise a sum out of the rents and profits of land charges it on the inheritance, unless the context shows that annual rents and profits alone are meant.

"In general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell:" per Lord Hardwicke, C., *Green* v. *Belcher* (1737), 1 Atk. 505.

"If a term was created to raise [a charge] by the rents and profits, I should say it might be done by sale or mortgage:" per Lord Thurlow, C., *Shrewsbury* v. *Shrewsbury* (1790), 1 Ves. Jun. 227 at p. 234.

"The rule is that where there is a trust to pay, or to raise and pay, or to raise or pay, gross sums out of rents and profits, that means out of the estate; and you may sell it or mortgage it for the purpose of paying the gross sum, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for that purpose:" per Jessel, M.R., *Metcalfe* v. *Hutchinson* (1875), 1 Ch. D. 591 at p. 594 (a case on a will).

Examples.

Trustees directed to pay portions on fixed days out of the rents and profits, which the rents and profits would not allow. *Held*, that they might sell: *Backhouse* v. *Middleton* (1671), 1 Ca. Ch. 173. See this case stated by Jessel, M.R., in *Metcalfe* v. *Hutchinson* (1875), 1 Ch. D. 591 at p. 593.

Charge of portion, trustees to take the rents and profits of the land till the same shall be raised; sale decreed: *Sheldon* v. *Dormer* (1693), 2 Vern. 310. See also *Warburton* v. *Warburton* (1701), 2 Vern. 420.

Trusts of term to raise portions out of rents and profits. *Held*, that they might be raised by sale or mortgage: *Trafford* v. *Ashton* (1718), 1 P. Wms. 415.

All the prior cases are discussed in *Allan* v. *Backhouse* (1813), 2 V. & B. 65 (a case on a will).

Context may show that annual rents only are charged.

The context may show that annual rents and profits only are intended. Thus, where the trusts of a term for raising portions were to raise them "out of the rents and profits of the said premises and by leasing thereof" for lives or years; and no time was fixed for payment of the portions, a mortgage of the term was declared invalid: *Ivy* v. *Gilbert* (1722), 2 P. Wms. 13; Pre. Ch. 583; affirmed in D. P. (1723), 6 Bro. P. C. 68; *Mills* v. *Banks* (1724), 3 P. Wms. 1 at pp. 7, 8; *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659; *Okeden* v. *Okeden* (1738), 1 Atk. 550 (a case on a will).

Rent charges charge *corpus*.

A rent charge, or periodical payment charged on, or issuing out of the rents and profits of land, is a charge on the inheritance, unless the context shows that annual rents and profits alone are meant.

A sale or mortgage of the land may be ordered to raise arrears of the rent charge: *Cupit* v. *Jackson* (1824), 13 Price, 721

at p. 733 ; *White* v. *James* (1858), 26 Beav. 191 ; *Hall* v. *Hurt* (1861), 2 J. & H. 76 ; *Scottish Widows Fund* v. *Craig* (1882), 20 Ch. D. 208 (where the earlier cases are discussed, and *Graves* v. *Hicks* (1841), 11 Sim. 551 (a case on a will) is distinguished) ; *Re Tucker, Tucker* v. *Tucker*, [1893] 2 Ch. 323 ; *Hambro* v. *Hambro*, [1894] 2 Ch. 564 ; but such an order is discretionary only, and not as of course, *Hall* v. *Hurt* (1861), 2 J. & H. 76 ; *Re Tucker, Tucker* v. *Tucker*, [1893] 2 Ch. 323 ; *Hambro* v. *Hambro*, [1894] 2 Ch. 564 ; and if the rent charge be secured by a term, the term only, and not the fee simple of the land, can be sold or mortgaged : *Blackburne* v. *Hope Edwardes*, [1901] 1 Ch. 419 ; and the context may show that the rent charge is payable out of income only : *Clifford* v. *Arundell* (1859), 27 Beav. 209 ; 1 D. F. & J. 307.

Capital sums charged on land payable at fixed times carry interest.

All capital sums charged on land, and payable at a fixed time, carry interest from the time fixed for payment, though not so expressed in the deed creating the charge.

" Now I take it to be settled at the present day that if you find in any settlement a provision that a sum of money is to be charged on land and the money is to be paid at a fixed time, the sum itself being fixed, then, as between the owner of the land and the person entitled to the money, although nothing is said in the settlement as to interest, in the eye of a Court of Equity from the date fixed for payment of the money that money bears interest. . . . So in the case of portions raisable out of land at a fixed time and to a fixed amount they certainly bear interest : " per Romer, L.J., *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781 at p. 794. " It is equally well settled in the case of a portion that, although no mention is made of interest, yet it is a charge which carries interest at the rate current in the country in which the land charged is situate. For that, *Balfour* v. *Cooper* (1883), 23 Ch. D. 472, is a clear authority : " per Cozens-Hardy, L.J., *Ibid.* at p. 796.

Rate of interest.

When portions are vested.

The rules as to the vesting of portions differ according as they are charged or not charged on land : see per Lord Hardwicke, C., *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198 at p. 207. They have only been established after considerable differences of opinion, and *dicta*, and even decisions, of eminent judges will be found not in accordance with the rules.

There is no rule of law or equity which prevents a settlor from directing, or empowering the donee of a power of appointment to

direct, the vesting of portions at any time the settlor or donee may choose. The following rules are rules of construction, applicable only in the absence of clearly expressed intentions as to the time of vesting :—

Portions charged on land.

"1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.

"2. That where the language of the power is clear and unambiguous, effect must be given to it.

"3. That where, upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

"4. That where, upon the true construction of both instruments, the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried:" per Lindley, L.J., *Henty* v. *Wrey* (1882), 21 Ch. D. 332 at p. 359.

These rules must apply equally to cases in which the portions are limited directly by the settlement itself, and not through the medium of a power. The question in either case is one of construction (per Jessel, M.R., and Lindley, L.J., *Henty* v. *Wrey*, 21 Ch. D. 332 at pp. 338, 355); in the former case, of the settlement only; in the latter, of the instrument conferring and that exercising the power.

Where no time named for payment, portions charged on land do not vest before twenty-one, even if interest be given.

Where no time is named for the vesting or payment of portions charged on land, they vest in sons at twenty-one, and in daughters at twenty-one or on marriage, and not before, even though interim interest or maintenance is given.

"There is considerable difficulty in reconciling all the authorities upon the question when a portion charged on land vests and when it does not, and the Court has often struggled even against the words of an instrument in order to avoid coming to the conclusion that a portion charged on land in favour of a child vested before such child attained twenty-one or married:" per Lindley, L.J., *Henty* v. *Wrey* (1882), 21 Ch. D. 332 at p. 358.

Examples.

Settlement by owner of land on trust to pay his son and heir 100*l.* per annum, and then to make a provision of 100*l.* apiece for

his younger children, sons and daughters, to be raised and paid according to their seniority, and a maintenance in the meantime. *Held*, by Lord Jefferies, L.C., that "whereas many of the younger children died in the lifetime of their father" (it is not stated that they died under twenty-one, but they probably did) "the administrators of the children so dead should have no benefit of this provision, but the same should cease, but in case any of the daughters had been married in the lifetime of the father and died, the husbands, as their administrators, should have had their portions:" *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334.

By marriage settlement a term was vested in trustees, to commence after the death of the survivor of the father and mother, in trust within twelve months after the death of the survivor to raise portions for daughters. *Held*, that a daughter who died at the age of five, after the father's death, and in the mother's lifetime, was not entitled: *Bruen* v. *Bruen*, or *Brewin* v. *Brewin* (1702), 2 Vern. 439; Prec. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2 (where it is added, "The daughter died within the year, but it does not so appear by this report").

Under a marriage settlement a father had power to create a term for raising portions for younger children, to be paid at such time as the trustees should appoint; the father limited the term and died. *Held*, that a younger child who survived the father and died under twenty-one, the trustees not having, as to him, made any appointment, took nothing: *Warr* v. *Warr* (1702), Prec. Ch. 213. *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659, is to the same effect.

By a resettlement made by a widow, tenant for life in possession, and her eldest son, a sum of 2,500*l.* was charged, to be raised at the end of twelve years after the widow's death, to be paid to the younger children "in the following proportions, viz., 1,000*l.* to J.," and 500*l.* to each of the three daughters, to be paid to them respectively when raised, and until raised, 150*l.* annually was to be paid out of the rents and profits by way of maintenance. J. subsequently died under twenty-one in his mother's lifetime. *Held*, that the 1,000*l.* was not to be raised. Lord Manners, C., said: "The general rule is, that where there is a charge upon land, with or without interest, payable at a future day, it shall not be raised when the party dies before the time of payment: the exception to that rule is, where the time of payment is postponed for the convenience of the estate, *i.e.*, where the person is of capacity to receive and to have occasion for the charge, but the estate is not in a situation to pay; as, for instance, if an estate be limited to A. for life, remainder to B.,

Interim maintenance.

charged with a sum of money for C., payable on the death of A.; if C. should die before A., yet the representative of C. would be entitled: for A. had the estate disencumbered, and the money could not be raised in his lifetime, but C. had a vested interest in the charge, as well as the remainderman in the estate charged:" *Ruby* v. *Foot* (1817), Beatt. 581.

By a deed charging portions in exercise of a power contained in a will, the appointor charged the estates with the sum of 2,000*l.* for the portions of the daughters of his marriage to be raised within three calendar months after his decease, and to be forthwith paid to the portionists. *Held*, that the representatives of a daughter who attained twenty-one and died in her father's lifetime were entitled to a portion (but, per Turner, L.J., the point not arising for decision, that daughters who died minors and unmarried did not take a portion); *Remnant* v. *Hood* (1860), 27 Beav. 74; 2 De G. F. & J. 396.

In *Davies* v. *Huguenin* (1863), 1 H. & M. 730; 32 L. J. Ch. 417; 11 W. R. 1040; 8 L. T. N. S. 443; 2 N. R. 101, where the trusts of the term were to raise 6,000*l.* for the portions of the children (other than the eldest son), equally to be divided among them if more than one, the representatives of a daughter who attained twenty-one and died a spinster in her parents lifetime were held to be entitled (see 1 H. & M. at p. 743), while the representatives of a child who died an infant were held not to be entitled, to a portion.

The case of *Rivers* v. *Derby* (1688), 2 Vern. 72, must be considered as overruled, unless it can be supported on the ground that the portions were payable out of rents only: see per Jekyll, M.R., *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659 at p. 672; and *Mayhew* v. *Middleditch* (1782), 1 Bro. C. C. 162, would probably not be followed now as to the children who died under twenty-one, unless it can be supported on the words of the appointment, as to which Lord Thurlow, C., said (at p. 165): "It is clear all the children were designed, according to the appointment. As to the time of vesting, according to the instrument, without any time named, they must vest immediately. This differs from all the cases, for this is a case where, after marriage and upon a view of an existing family, the parents have given portions to persons described."

Rule applied in favour of other portionists.

The rule will be applied for the benefit not only of the heir or person taking the estate, but, if such an intention is expressed, for the benefit of the other members of the class of portionists: *Davies* v. *Huguenin* (1863), 1 H. & M. 730 at p. 746.

Notwithstanding the rule above mentioned, which is a rule of

Appointors may vest portions at any time.

construction only, an appointor may, in the absence of fraud and if the terms of the power so permit, make a portion vest in a child at any time he thinks proper, and *à fortiori* portions may by the original instrument be so vested: *Henty* v. *Wrey* (1882), 21 Ch. D. 332, overruling the decision of Kay, J., 19 Ch. D. 492, and explaining *Lord Hinchinbroke* v. *Seymour* (1784), 1 Bro. C. C. 395, which is apparently *contrà*, on the ground that the appointment in that case was a fraud on the power.

A direction that portions be raised out of rents and profits only, requires that the appropriation of the rents and profits should commence as soon as they become applicable for that purpose; and it is difficult to conceive (in the absence of expressed intentions to the contrary) how it is possible that any of the portions should remain in contingency after the appropriation has once begun. It follows that—

Portions out of rents and profits only, vest as soon as rents become applicable.

> Where no time is named for the vesting or payment of portions charged on annual rents and profits only, as distinguished from *corpus*, every child who is alive at the time when the rents and profits begin to be applicable for providing the portions takes a vested interest.

By marriage settlement lands were limited in strict settlement, proviso that if there should be no issue male, and there should be one or more daughters living at the husband's death, the trustees should stand seised to the intent that such daughter and daughters should receive 10,000*l.* out of the rents, revenues, and profits, together with 100*l.* per annum apiece for maintenance, from the death of the father till payment of the 10,000*l.* The husband died without male issue, leaving a daughter who died under twenty-one, without having been married. *Held*, that she was entitled to her portion: *Rivers* v. *Derby* (1688), 2 Vern. 72. To the same effect are *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659 at p. 671; *Cowper* v. *Scott* (1731), 3 P. Wms. 119 (a will case). It should be observed that the decision in *Rivers* v. *Derby*, as reported in Vernon, was put, not on the ground of the portion being raisable out of the rents and profits, but only on the circumstance that no time was appointed for payment; but Jekyll, M.R., in his judgment in *Evelyn* v. *Evelyn*, appears to have considered that the vesting of the portion in *Rivers* v. *Derby* depended upon its being payable out of rents and profits.

When estate is discharged.

Where the portions are payable out of rents and profits only, the estate is not discharged as soon as the rents and profits amount to a sum sufficient to discharge the portions, unless the portions have been in fact paid.

By a marriage settlement a term of years was vested in trustees, in trust to raise out of the rents and profits, by annual payments of 500*l.* in each year, but not otherwise, the sum of 3,000*l.* for portions for younger children. *Held*, that the clause did not create a charge for six years only from the date of the deed, and that, no sum having been raised, the estate was not discharged at the end of the six years, although the rents during that time were amply sufficient to have satisfied the charge: *Re Forster* (1869), Ir. R. 4 Eq. 152.

Portions charged on land payable on events personal to portionists do not vest previously, even if interest be given.

A portion charged on land and made payable on the happening of some event personal to the portionist does not vest unless and until that event happens, even though interim interest or maintenance is given.

"It is very clear that charges on land, payable at a future day, cannot be raised if the party dies before the payment; there is no difference at all, whether the charge is created by deed or will, nor whether it is provided by way of portion for a child or given merely as a legacy by collateral relations or others. . . . I have often heard it said that the reason why legacies, &c., charged on land, payable at a future day, shall not be raised if the legatee dies before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the heir is a favourite of a court of equity, and ought to have the preference of the representative of a legatee, and likewise that the Court will go as far as they can in keeping the real estate entire, and as free from incumbrances as possible. But I think the Court has never gone upon such reason; but the true reason I take to be this, that the Court will govern themselves, as far as is consistent with equity, by the rules of the Common Law. In the case of personal estate, the rule is the same here as in the Civil Law, that there may be an uniformity of judgments in the different courts; but in the case of lands, the rule of the Common Law has always been adhered to:" per Lord Hardwicke, C., *Prowse* v. *Abingdon* (1738), 1 Atk. 482 at p. 485.

"It is settled now, whether the portion charged upon land be given with or without interest, by deed or will, if the person dies before the age at which it becomes payable, it shall sink into the

estate:" per Lord Hardwicke, C., *Boycot* v. *Cotton* (1738), 1 Atk. 552 at p. 555.

"It is a well-established rule as to portions or legacies payable out of land, that if made payable at a certain age, or marriage or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land:" per Lord Cottenham, C., *Evans* v. *Scott* (1847), 1 H. L. C. 43 at p. 57.

Examples.

A term of years was limited in a settlement on trust to raise 2,000*l.* for the daughters, and maintenance yearly not exceeding 20*l.* per annum; if one daughter, 2,000*l.*, and if any daughter died, the survivors or survivor, if more daughters than one, to have the part of the daughters dying: viz., if the father die without issue male, or having such issue male by his then wife, if such issue should die in minority or unmarried, the trustees should out of the premises levy and raise 2,000*l.* for the portion and portions of such daughter and daughters, together with a competent yearly maintenance for every such daughter and daughters not exceeding 20*l.* per annum, and the 2,000*l.* to be paid at twenty-one or marriage, which should first happen. The father died, leaving one son, who died without issue, leaving a sister who died under age and unmarried. *Held*, that she was not entitled to a portion: *Bond's Case* (1685), 2 Ca. Ch. 165.

Term limited by a settlement to trustees for the raising of 4,000*l.* apiece for younger children for their portions to be paid them at their respective marriages or ages of twenty-one years, which should first happen, and for paying unto them 100*l.* per annum maintenance in the meantime. *Held*, by Lord Guildford, L.K. (whose decision was afterwards affirmed in D. P.), that a child who died under twenty-one unmarried was not entitled to a portion: *Poulet* v. *Poulet* (1683), 1 Vern. 204; *Pawlett* v. *Pawlett* (1685), 1 Vern. 321; 2 Rep. in Ch. 286; 1 Eq. Ca. Ab. 267, pl. 1; 2 Vent. 366.

Interim maintenance.

Devise of 1,000*l.* to a daughter for her portion charged on real estate and payable at twenty-one; the daughter dying before twenty-one the portion sinks into the land: *Smith* v. *Smith* (1688), 2 Vern. 92. To the same effect is *Rich* v. *Wilson* (1728), Mosely, 68.

Charge by a father, under a power in a settlement, of certain sums as portions for his several children, *nominatim*, to be paid to such children as should have attained twenty-one before his death within one year after his death, and to such child as should be under twenty-one at his death, to be paid to his sons at twenty-one, and to his daughters at twenty-one or marriage, which should first

happen, the respective portions to be paid with interest at 5*l.* per cent. from his death to the payment thereof. *Held*, that a daughter who survived the father and died under twenty-one took nothing: *Boycot* v. *Cotton* (1738), 1 Atk. 552; *Gawler* v. *Standerwick* (1787), 2 Cox, 15 (a case on a will).

Postponement of payment of portions charged on land for convenience of estate does not affect vesting.

> Where the actual raising and payment of a portion charged on land is directed to be postponed until the happening of a specified event, having reference to the circumstances of the land out of which it is made payable, such direction does not affect the time of vesting, which is not thereby postponed till the time of actual payment.

The result of this rule, taken in connection with the two preceding rules, is that, if portions are made payable after the death of the tenant for life, then whether they are or are not made payable at twenty-one, no child will take who does not attain twenty-one, but every child will take who attains twenty-one, whether he survives the tenant for life or not.

This rule is distinguished from the preceding rule in Fearne, C. R., 552 *et seq.* in the notes.

Examples.

Among the earliest cases on this rule are *Butler* v. *Duncombe* (1718), 1 P. Wms. 448, and *Pitfield's Case* (1728), 2 P. Wms. 513. The rule, however, was hardly thoroughly established so early as the dates of those cases, for in *Bradley* v. *Powell* (1736), Ca. t. Talb. 193, where A., the father, and B., the eldest son, resettled an estate to the use of A. for life, remainder to trustees for a term to raise 1,100*l.* to be paid to C., the second son, within six years after A.'s death, or as soon after as the same could be raised, and in the meantime interest from A.'s death for maintenance, and C. attained twenty-one, and died in A.'s lifetime; it was held, that he took nothing. Stress was laid on the fact that the gift for maintenance necessarily supposed him alive at his father's death, and that, the interest being contingent, the principal must also be contingent, but this case was disapproved by Lord Hardwicke, C., in *Tunstall* v. *Brachen* (1753), Amb. 167 at p. 170; and the rule was followed in *Lowther* v. *Condon* (1741), 2 Atk. 128 (a case on a will), and in *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208, where a sum of money was provided by a term after the mother's death for daughters' portions to be payable at twenty-one or marriage, and if any should die before their portions became due and payable they should

go to the surviving daughters, and it was held that a daughter who attained twenty-one and died in the mother's lifetime was entitled to a portion.

By a post-nuptial settlement, an estate was limited to A. and B., successively for life, remainder for a term of years upon trust within one year after the decease of A. and B. to raise 850*l.* for a named daughter, R., her executors, administrators, and assigns. She was thirty years old at the date of the settlement, and died afterwards in A.'s lifetime. Clarke, M.R., said:—"The representatives are entitled; the present is not like the cases where portions are charged on land, payable at twenty-one or marriage, and the children die before either of those events happens: the portion sinks because by their death they could not want it. Here the daughter was of age, and had occasion for the money. The postponing the payment was merely for the convenience of the father and mother and the estate:" *Smith* v. *Partridge* (1755), Ambl. 266 at p. 267. *Cholmondeley* v. *Meyrick* (1758), 1 Ed. 77; *Verney* v. *Verney* (1761), 2 Ed. 26; and *Powis* v. *Burdett* (1804), 9 Ves. 428, are cases to the same effect.

"It is a well-established rule as to portions or legacies payable out of land, that . . . if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life, as in *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208; *Cholmondeley* v. *Meyrick* (1758), 1 Ed. 77, and many other cases;" per Lord Cottenham, C., *Evans* v. *Scott* (1847), 1 H. L. C. 43 at p. 57. *Remnant* v. *Hood* (1860), 27 Beav. 74 on app., 2 De G. F. & J. 396, and *Davies* v. *Huguenin* (1863), 1 H. & M. 730, are more modern cases in which the rule was followed.

Interest is allowed on contingent portions charged by parents on land.

Where portions are charged on land by a parent or person *in loco parentis* and no maintenance is provided by the settlement, interest by way of maintenance will be allowed during the minority of the children, even although their interests are contingent.

"I think the general rule stated in Lewin on Trusts (10th ed.), p. 472, is accurate. He says, 'It will be collected . . . that portions

are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children.' I think that proposition is sound, and I adopt it:" per Farwell, J., *Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. 683 at p. 686. In that case interest at the rate of 3 per cent. per annum was allowed.

Probably interest cannot be allowed until the term for raising the portions comes into existence: *Butler* v. *Duncombe* (1718), 1 P. Wms. 448: see per Farwell, J., *Re Greaves' Settled Estates*, [1900] 2 Ch. 683 at p. 685.

Contingent portions only raised if contingency happens.

Of course if the term for raising the portions never comes into existence, or the contingency on which the portions are raisable never happens, no portions can be raised even for children who attain twenty-one or, being daughters, marry.

Reversionary term in marriage settlement (in remainder after the estates tail) in trust in case there should be no son, or if there should be a son, and he should die under twenty-one, and without issue, then, by sale or rents and profits, in case the term should have taken effect in possession, to raise 6,000*l.* for the daughter or daughters, payable at sixteen, if either the husband or wife should be then dead; but if both should then be living, then within six calendar months after the death of either, with interest from the death of husband and wife, or either; and in case any of the daughters should die before the portion became payable, her share to go to the survivors; proviso that if no daughter should be alive at the time of the failure of issue male, the portions should sink. There was no son, and only one daughter, who attained sixteen, and died, living both parents. The wife subsequently died without a son. *Held*, that, as there was a possibility of the birth of a son at any time till the death of the wife, there was not a "failure of issue male" at the time of the daughter's death, but the proviso was still operative at the subsequent death of the wife, and consequently the daughter was not entitled to a portion: *Gordon* v. *Raynes* (1732), 3 P. Wms. 134.

Realty settled on husband and wife in succession, remainder for a term on trust, if no issue male, or, if there were such, and they all died without issue male before twenty-one, and there should be one or more daughter or daughters, then to raise portions. Proviso, that if there should be a son that should have issue male or attain twenty-one, the term should cease. A son attained twenty-one, and died in his father's lifetime. *Held*, that portions were not raisable: *Worsley* v. *Granville* (1751), 2 Ves. Sen. 331.

If money is to be raised in any event the money is treated as a money fund.

Where portions are charged upon land but the sum payable for portions has to be raised in any event, that is, not only in the event of there being persons entitled to portions, but, if there be no such persons, for the benefit of some person other than the portionists, the portions are treated as being payable out of a money fund and not as portions charged on land, and the rules applicable to portions payable out of such a fund are applied. Thus, in *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198, a term was created to raise money for younger children; if none then for the eldest son, and if no eldest son, for the executors of the appointor; Lord Hardwicke said (p. 207), "the rules laid down and established in this Court as to sums of money by way of portion or provision for children charged on land sinking into the estate, these cases and rules are not applicable, because in respect of the present parties and the rights they claim I am of opinion this must not be considered a sum of money charged on land. . . . The subject matter of the present consideration is a sum of money which must in all cases be raised out of the estate." Similar cases are *Reilly* v. *Fitzgerald* (1843), Dru. temp. Sugd. 122 (see p. 159); 6 Ir. Eq. R. 335 (see p. 352); *Re Dennis* (1857), 6 Ir. Ch. R. 422; *Re Howard* (1858), 7 Ir. Ch. R. 344.

Portions payable out of personalty.

The rules stated so far relate to portions charged on land; with regard to portions not charged on land, a legacy, not charged on land, to A., payable at a future time or on an event certain, is held by the law of England, following the Civil Law (see Fearne, C. R. 552, note (*g*); 2 Spence, Eq. Jur. 395; *per* King, C., *Duke of Chandos* v. *Talbot* (1731), 2 P. Wms. 600 at p. 612, note; *per* Lord Hardwicke, *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261 at at p. 262; *per* Lord Loughborough, C., *Bolger* v. *Mackell* (1800), 5 Ves. 509 at p. 513), to be *debitum in praesenti, solvendum in futuro: i.e.* the payment only, not the vesting, is deferred: see per Kindersley, V.-C., *Parker* v. *Hodgson* (1861), 1 Dr. & Sm. 568 at p. 573; and the same doctrine applies at common law to a promise or covenant for payment: Co. Litt. 292 b; *Goss* v. *Nelson*, (1757), 1 Burr. 226; and in equity to trusts for payment: *Combe* v. *Combe* (1741), 2 Atk. 185. But under a promise to pay, or trust for payment to, A. when, or if, an uncertain event happens, A.'s interest is contingent, both at common law and in equity.

"*Debitum in praesenti, solvendum in futuro.*"

The courts must have been familiar with questions arising on wills for a considerable period before settlements *inter vivos* of personalty were introduced; and it seems probable that the Court of Chancery, when called upon to deal with instruments of the latter class, adopted, or assumed the applicability of, the rules which it had

already received from the Civil Law and applied to legacies under wills; and it is obvious that burdening the common law inheritance with a charge for younger children is a different thing from declaring trusts of an existing fund of personalty, and that reasons which would militate against the former have no application to the latter.

Whether any distinction between wills and settlements.

As a general rule, the cases make no distinction between wills and settlements in respect of the vesting of personalty portions. But it is sometimes necessary to consider the different circumstances of a testator and a settlor, or, as it has been called, "the different characters of a will and settlement:" see per Turner, V.-C., in *Farrer* v. *Barker* (1852), 9 Ha. 737 at p. 744.

It is difficult to find conclusive authority that the civil law doctrine of the immediate vesting of personal legacies payable at a future time applies to trusts of personalty under settlements, for in each of the cases cited below there seem to have been special words; it is, however, submitted that the following rule is, on the whole, established:—

Personalty portions payable at 21, vest at birth.

> A trust in a settlement, of personal property for the children of A., payable at twenty-one, or as to daughters on marriage, gives, if there are no further words, every child a vested interest at birth.
>
> It follows that if a child dies an infant, and being a daughter without having been married, and whether in the lifetime of the parents, or of one of them, or not, the administrator of such child is entitled to a portion.

"The settled distinction between a portion secured out of a personal estate and one charged on land, which rule holds also with regard to legacies, viz., if a legacy be given out of a personal estate to J. S., payable at his age of twenty-one, and he dies before twenty-one, yet the legacy shall go to his executors:" Per Curiam (King, L.C., Raymond, L.C.J., and Sir J. Jekyll, M.R.) *Gordon* v. *Raynes* (1732), 3 P. Wms. 134 at p. 138.

"Let us now consider the difference between a portion payable out of lands, and one payable out of personal estate; and the difference is, that if money be given to a man, payable when he comes of age, and he dies before the day of payment, it shall go to his executors; but, if it be a portion to be raised out of lands, it shall sink into the estate, for the benefit of the heir:" per Willes, C.J., *Harvey* v. *Aston* (1737), 1 Atk. 361 at p. 377. Lord Hardwicke

(*Ibid.* at p. 379) speaks of "the difference between portions out of lands and personal *legacies;*" the case before him was on a settlement, but, as before remarked, the authorities seem to make no distinction between deeds and wills as to the present question.

Trust of 2,000*l.*, part of 3,000*l.* vested in trustees for husband and wife for life, and after their deaths "for such son of the body of the wife by the husband as shall live to attain twenty-one, when and at such time as such son shall have attained to the age of twenty-three years complete." *Held*, by Lord Hardwicke, C., that a son who attained twenty-one, but died under twenty-three, was entitled: *Combe* v. *Combe* (1741), 2 Atk. 185.

Opinions *contrà.*

There are two decisions of Lord Hardwicke *contrà*, viz., that portions out of a money fund are subject to the same rules as portions charged on land, and therefore do not vest until twenty-one or marriage: *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198, where, though there was a term, the L. C. said (at p. 207) that the money was not to be considered as charged on land; and *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 262, but it is submitted that these cases are not in accordance with the law.

Examples.

By marriage settlement personalty was vested in trustees upon trust for the wife for life, and within one year next after her decease, in default of appointment (which happened) to pay the principal and all arrears of interest to all and every her child and children, part and share alike, and for want of such issue over. Arden, M.R., said that it was "a vested interest in all the children she might ever have upon their respective births, to be devested by the exercise of the power of appointment." The question for decision was whether a daughter who attained twenty-one, but died before her mother, was entitled to a share: *Vanderzee* v. *Aclom* (1799), 4 Ves. 771, see pp. 784 and 787.

"The terms of the settlement are very ambiguous. . . . I am of opinion that the child did take a vested interest at the moment of its birth. . . . The grounds of my opinion are these—I think the recital in the settlement . . . shows that this provision was intended to be and was considered as a money portion. . . . The parties contemplated the deaths of some of the children before twenty-one or marriage, and accordingly they provided for such an event by giving the share of the child so dying to the survivors, but they only provided for such an event for the benefit of the other children as a class; they did not go on to make any provision for the event which has happened" [viz., of there being one child only who died an infant]. "I look upon this, therefore, as a money

fund raisable in the event stated:" per Sugden, C., *Reilly* v. *Fitzgerald* (1843), 6 Ir. Eq. R. 335 at pp. 351; Dru. 122 at pp. 157, *et seq.*

In *Hynes* v. *Redington* (1844), 1 Jo. & Lat. 589; 7 Ir. Eq. R. 405, the fund was by articles (which, however, were not executory, in the sense of being incomplete) agreed to be vested in trustees in trust for all the younger children, to be paid in such shares and at such times, &c., as the father should appoint, and in default to be paid to such children equally; the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage, and in the meantime, "until their portions should become payable," to apply any sums not exceeding the interest of their said shares respectively for or towards their maintenance. The father made no appointment. There were two daughters and one son, who all survived both parents, but subsequently one of the daughters died under age and unmarried. Sugden, C., said (1 Jo. & Lat. at p. 604): "It was contended that the surviving daughter took the whole fund by survivorship. There is no such gift expressed in the settlement; if she takes the whole, it must be by implication or construction, not by direct gift. There is no gift of the whole fund to an only child attaining twenty-one years, and I find no authority which authorises me, upon any supposed rule applying to gifts to a class, to hold that the only surviving child will take the whole fund, without a direction in the settlement for that purpose. . . . The gift over to the son is in default of issue of the marriage" (which did not happen). "The [ultimate] gift over to the personal representatives of the husband shows that the fund was not to go over unless there was an absolute failure of children." And further (7 Ir. Eq. R. at pp. 411, 412): "The gift over satisfies me that the fund was not to go over unless there was an absolute default of other children. . . . The intention may have been to give the fund to the children who attained twenty-one, but I cannot alter the plain legal construction of this instrument. It is a trust for all the children. . . . They took vested interests as they were born, although their shares were not to be paid till a particular age, with maintenance in the meantime. It would be desirable in a well drawn settlement that it should contain clauses of survivorship and accruer in case the children died under the age when the portions are payable. But there is no such clause in this settlement, and I cannot introduce one."

In *Re Orme* (1850), 1 Ir. Ch. R. 175, a fund was settled in trust after the death of A. to transfer it and all the interest, &c., unto

and amongst all and every the child or children of the marriage, or the issue of any such child or children who might happen to be *then* dead leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such ages, times, and in such shares, if more than one, and with such maintenance in the meantime and under and subject to such conditions, &c., and limitations over (such limitations over being for the benefit of some one of such children or issue) as A. by his will, &c., should appoint, and in default of appointment to pay the fund between all the children (if more than one) of the marriage, and the issue of any children who should then be dead leaving issue; and if but one, to such one child; the said fund to be paid to sons at twenty-one and to daughters at twenty-one or days of marriage, in case such ages or days should not take place until after A.'s death; but in case such should happen in his lifetime, then such payment should be postponed till after his death. It was declared that the shares of the fund and the interest thereof should, subject to the power, vest in sons at twenty-one and in daughters at twenty-one or marriage, though A. should be alive. A., by will, appointed the fund to the children share and share alike on attaining twenty-one or marriage with consent, and directed that the interest should be, for their maintenance, given in trust to his wife until the sons entered professions or attained twenty-one, and the daughters attained twenty-one or married with consent. It was held, 1st—That the portions were *by the settlement* vested before the period of payment; 2nd—That the provision *in the will* as to maintenance was of itself sufficient to vest the portions. And it was said that the express provision as to vesting could not qualify the previous part of the clause, and that the rules as to the vesting of portions and legacies are the same, *i.e.*, as appears from the authority cited (*Stephens* v. *Frost* (1837), 2 Y. & C. Ex. 297 at p. 302), in cases where there is a gift of the whole interim interest.

Trust of personalty "for all the children as tenants in common and the several issue of the bodies of all such children" to be paid at twenty-one or marriage, and the interest in the meantime to be applied towards their respective maintenance. *Held*, by Lord Langdale, M.R., that the children took absolute interests at birth: *Mount* v. *Mount* (1851), 13 Beav. 333.

"With respect to a money fund, where no time or age is appointed for the vesting of the shares, the children in general take immediate absolute interests in their portions, so as to pass them to their personal representatives, although they die minors and

unmarried:" *Re Howard's Trusts* (1858), 7 Ir. Ch. R. 344 at p. 350.

Trusts in a marriage settlement for the trustees (on the death of the survivor of husband and wife) to "transfer, assign, and make over 10,000*l.* to and between or amongst all and every the child and children . . . *his, her, or their respective executors, administrators, or assigns,* equally to be divided," &c., "if one, then to that one alone." There was a provision that the shares of such of the children as should be minors at the decease of the surviving parent, were to be paid, transferred, assigned, and made over to them if sons at twenty-one, or if daughters, at twenty-one or marriage, with the interim interest by way of maintenance. There was a gift over in the event of there being no children, or if they should all happen to die before becoming "entitled." Four children survived their parents and attained twenty-one, and two (a son and a daughter) died in early infancy, living the parents, so that the gift over did not arise. Romilly, M.R., said (28 Beav. at p. 57):—"Here is a direction that the shares vested while minors should be paid when they attained twenty-one years; how can I get over those express and distinct words of the settlement, and say that the shares of the children did not vest until they attained twenty-one? . . . The Court will exercise considerable violence in qualifying the terms of a settlement for the purpose of making the fund vest as early as possible, so as to prevent the children from being excluded; but I never yet heard that the Court had violated or forced the terms of any settlement in order to prevent or postpone a vesting [till twenty-one or survivorship (in some reports)]; it has endeavoured to make it vest at an earlier period than twenty-one, but never at a later." On appeal, Lord Cranworth, C., said (2 De G. J. & S. at p. 328):—"If the sentence had ended with its first member, there could be no doubt that every child at its birth obtained a vested interest, liable to be divested *pro tanto* on the birth of other children; but the argument is that this obvious construction is modified by the gift over. According to the original clause, every child at its birth became entitled. . . . But there is a gift over in case of the death of all the children before they should become 'entitled' to their respective shares. This, it was argued, shows that it could not have been intended to confer any indefeasible interest on a child at its birth—for how could a child die before it should become entitled, if it became absolutely entitled at the moment of its birth? The whole case depends on our putting a proper interpretation on the word

"Entitled."

'entitled.' That word may, without any violence to language, mean entitled in interest, or entitled in possession—that is, entitled to payment. The M.R. considered the latter to be, in this case, the proper construction, and I concur with him. . . . I cannot adopt the reasoning of the appellants, by which they would fix arbitrarily on the majority of every child as the time at which its share was to vest." It was accordingly held that the representatives of the infants took shares: *Jopp* v. *Wood* (1860), 28 Beav. 53; 29 L. J. N. S. Ch. 406; 6 Jur. N. S. 620, and on app. (1865) 2 De G. J. & S. 323; 34 L. J. N. S. Ch. 625; 11 Jur. N. S. 833.

Settlement of personalty for the benefit of all the children of the marriage to be paid or assigned to such children at twenty-one, or being daughters, on marriage. "I take it to be reasonably clear that upon the true construction of this settlement . . . each child would take from its birth a vested interest:" per Turner, L.J., *Currie* v. *Larkins* (1864), 4 D. J. & S. 245 at p. 255, but this is only a *dictum*.

In *Bardon* v. *Bardon* (1865), 16 Ir. Ch. R. 415, a sum of stock was under articles of agreement vested by a father, A., in trustees on trust for A. for life, and after his death as to several specified sums thereof to transfer them respectively to his children C., N., J., B., E., and three others, in each case "for his (or "her") own absolute use and benefit," proviso, that no transfer or payment should be made to the said C., N., J., B., or E., until he or she should attain twenty-five, and also that in case any of them should die before the share to which he or she was entitled under the articles should have been transferred to him or her, the share of the person so dying should accrue to the survivors. A. died; then B. (a daughter) died under twenty-five and unmarried, and at her death J. and E. were under twenty-five. Then E. (a daughter) died under twenty-five and unmarried. The question was whether on E.'s death under twenty-five her accrued share of B.'s portion went over. The M.R. held that the portions were vested, notwithstanding the proviso as to transfer, and some stress was laid on a direction that the dividends should be applied for maintenance. Therefore, though the gift over to the survivors operated to divest the original portions, yet the share accrued under the survivorship clause did not go over on death under twenty-five, but belonged to E.'s next of kin.

Context showing that shares do not vest at birth.

The context may show that the vesting is not to be at birth.

In *Mostyn* v. *Mostyn* (1844), 1 Coll. 161, it was held that two children who died infants, and without having been married, in their parents' lifetime, were excluded from sharing in the fund.

Knight-Bruce, V.-C., said (at p. 167): "The trust is for the children, but to be paid at twenty-one or marriage. . . . The words may or may not import a vesting on birth, according to circumstances. You must look at the rest of the settlement to see whether they import mere payment, or vesting. I find, in a subsequent part of the settlement, and in fact very near these words—forming almost part of the same clause—this declaration:—'That, in case there shall be no such child or children living at the time of the death of the survivor' (*i.e.* of the parents) 'or, if such, and they shall all happen to die before their respective ages of twenty-one years or days of marriage,' the fund is to go over. I think that this may be fairly taken as a sufficient indication of intention that the age of twenty-one or marriage was to be the period of vesting. Therefore I think that the two children who died minors (living their parents) without having married, did not acquire vested interests." The case stood over to make the personal representatives of the infants parties, and was re-argued on their behalf, when the V.-C. said that he adhered to his opinion on the construction of the settlement.

In *Re Dennis* (1857), 6 Ir. Ch. R. 422, infant children were held not to be entitled; this was by force of a gift over in case there should be no issue living at the decease of the parents, or if there should be issue then living, and such issue should die under twenty-one, &c. It was held that either the shares did not vest till twenty-one, &c., or if they did vest at birth, they were divested on death under twenty-one, &c.

Direction that shares shall not vest at birth.

Of course, if the settlement directs that the share is not to vest until the child attains twenty-one, a child who does not attain twenty-one takes no share. Thus where the trusts were for all the children, "and the same shall be a vested interest in and be paid to such children at twenty-one," a child who did not attain twenty-one took no share: *Re Colley's Trusts* (1866), L. R. 1 Eq. 496.

Where trust created by direction to pay on event personal to portionist, time of payment is time of vesting.

Where a trust of personalty is created only by a direction for payment to, or division among, the children on the happening of some event personal to themselves, the portion does not vest unless and until that event happens, even though interim interest or maintenance is given.

In *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261, a sum of 5,000*l.* was to be raised out of a money fund of 9,000*l.*, and to be paid to younger children at twenty-one, with interest for maintenance. If

any child died before its share was payable there was a gift over to the other younger children. There was only one younger child, who died an infant. *Held*, that the 5,000*l.* was not to be raised for his representatives against the eldest son. The remarks of Lord Hardwicke in this case, taken in connection with the circumstances before him, seem to express an opinion that the Civil Law doctrine as to the immediate vesting of a legacy payable at twenty-one, &c., does not apply to non-testamentary instruments. But he also remarks that there was no gift except in the direction to pay. "The power of raising and paying is directed and limited by the same words. There are no words to create any vesting, except those for raising and paying, which are at twenty-one. Supposing it had been in a covenant, and the child had died before twenty-one, it could never have become due"; and on this ground, and also on the force of the gift over, the decision might well be rested.

In *Campbell* v. *Prescott* (1808), 15 Ves. 500, there was a trust for accumulation until the settlor's grandchildren then living, or to be born, respectively attained twenty-one, and on their respectively attaining twenty-one "upon trust to pay unto such grandchildren respectively as he, she, and they should respectively attain unto such age, his, her and their respective shares and proportions not only" of the fund but also of the interim interest. *Held*, that a grandchild who died under twenty-one took nothing.

"The question in all such cases is whether the period of division is postponed on account of previous interests in the fund, which are given to other persons in the meantime, or on account of some qualification attached to the donee. In the former case, the deferred interest vests . . . on the execution of the settlement . . .; in the latter it is contingent;" per Wood, V.-C., *Re Theed's Settlement* (1857), 3 K. & J. 375 at p. 379. Accordingly, in that case, the trust being to pay at twenty-one, it was held that children who did not attain twenty-one took nothing.

In *Richardson* v. *Goodman* (1851), 3 Ir. Jur. 317, a policy on the husband's life and a bond were settled upon trust (after the death of the wife) "to pay and apply the principal moneys, &c., among the issue of the marriage," with a power of appointment to the parents, and in default of appointment, to pay and apply the said moneys to and amongst the issue of the marriage in equal shares upon their respectively attaining their respective ages of twenty-one or (if daughters) days of marriage. There were four children, of whom two died under age and intestate in the husband's lifetime.

The wife also died in his lifetime. The power of appointment was never exercised. The two sons, J. and W., who survived the husband, were still infants. *Held*, that, as the whole intent of the instrument "must, *primâ facie* at least, be considered as intended to be for the purpose of raising portions for the issue, to be given to sons when they arrived at twenty-one, or to daughters at twenty-one or marriage," and as the language was ambiguous, the Court ought not to give vested interests to infants.

Gift of interim interest does not accelerate vesting.

In cases falling under this rule, a gift of the whole interim interest to, or a direction to apply the whole interim interest for maintenance of, the children appears not to accelerate the vesting: *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261 at p. 264.

The only case where the vesting was accelerated by a gift of interest for maintenance is *Re Orme* (1850), 1 Ir. Ch. R. 175; but this case appears to have been decided as to this point on the authority of *Stephens* v. *Frost* (1837), 2 Y. & C. Ex. 302, and will cases. In *Stephens* v. *Frost* the property (leasehold) was vested in trustees "in trust for A. till he should attain the age of twenty-one years, and in the meantime in trust to collect the rents . . . and . . . apply them towards the maintenance . . . of A. during his minority, and upon A. attaining his age of twenty-one years upon trust to assign the premises and the accumulations of rents and profits, if any, to A. his executors, or administrators, for the unexpired remainder of the term." It will be observed that the *corpus*, not the interest only, was given to A. during his minority, so that the case is no authority on the point.

It is suggested in *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261 at p. 264, that possibly the direction for payment of the whole income for maintenance might make the principal vest in a child who survived the tenant for life but died under twenty-one, but there is no decision on the point.

Discretion to apply interim interest for maintenance.

A mere discretionary power to the trustees of the fund to apply all or any part of the income for the maintenance of the persons contingently entitled to the fund: *Barnett* v. *Blake* (1862), 2 Dr. & Sm. 117; or a contingent gift of interest: *Campbell* v. *Prescott* (1808), 15 Ves. 500, does not vest the principal.

Contingent gift of interest.

Gift over on death before portions "payable."

Where a life interest in the settled real estate or personalty is limited to one or both of the parents, the portions cannot (in most cases) be actually raised and paid over until the expiration of such prior interests, which is the period of distribution, when the portions become "payable" in the ordinary sense. Important questions, therefore, arise where a child attains twenty-one or

marries (or is living at other the time of vesting), and then dies, during the life of a tenant for life, and the settlement contains provisions which seem to deprive such a child of its portion; *e.g.*, where there is a gift over of the share of a child dying before the portion becomes "payable," "assignable," or "transferable." These, and similar expressions, may refer either to age or marriage —*i.e.*, the time of vesting, or to the time of actual payment—*i.e.*, the period of distribution.

"Payable," "assignable," "transferable."

In such cases, though clear and unambiguous words must have their proper effect, it is a rule of construction that—

Payment is, in clauses divesting portions, if possible read as vesting.

> Clauses or words divesting or giving over portions, provided by parents or persons in *loco parentis*, on the death of the portionist before the portion is payable, will, if possible, be referred to the period of vesting, and not to that of distribution.

The rule applies to portions charged on realty, as well as to shares of settled personalty.

A sum of money provided by a term in a settlement after the mother's death for daughters' portions to grow due and payable at twenty-one or marriage, and if any of them should die before their portions became due and payable, it should go to the surviving daughters. *Held*, by Lord Hardwicke, C., that a daughter who attained twenty-one, but died in her mother's lifetime, took a portion: *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208.

"As soon as these clauses came forward, in *Emperor* v. *Rolfe* (1 Ves. Sen. 208), Lord Hardwicke put a just construction upon them; and he referred the word 'payable' to the time in respect of the quality of the child, distinguishing between that and the time when *ex necessitate* the money was to be *de facto* raised:" per Lord Loughborough, C., *Willis* v. *Willis* (1796), 3 Ves. 51 at p. 54.

"The words 'payable,' 'assignable,' or 'transferable,' have different senses according to the different clauses of the settlement to which they refer. With reference to the right or capacity of the children, the sense is 'at twenty-one or marriage.' But then the enjoyment of the persons entitled for life is not to be broken in upon. It is therefore provided that the right, which exists for every other purpose, shall not be exercised to their detriment. With reference to that interest, the sense is 'not till the death of the tenant for life.' But it is only with reference to that, that the

preceding declaration is at all qualified; and as against every one but the tenant for life, the children have a right to say it remains unqualified. . . . As between themselves, the time of payment must be taken to be unaltered:" per Grant, M.R., *Schenck* v. *Legh* (1803), 9 Ves. 300 at p. 310.

"In settlements of this description there are two sets of clauses to be considered: the clauses of gift to the children, and the clauses of gift over to others upon failure of the children; and the authorities require that both sets of clauses should be clearly and unambiguously expressed" (*i.e.*, in order to exclude the rule): per Leach, V.-C., *Perfect* v. *Lord Curzon* (1820), 5 Madd. 442 at p. 445.

"Where a portion is provided for a son on attaining twenty-one, or for a daughter on attaining that age or being married, and those events happen in the lifetime of the parent, the child, though it dies in the lifetime of the parent, has acquired an absolute vested interest in the portion:" per Shadwell, V.-C. (1829), *Fry* v. *Lord Sherborne*, 3 Sim. 243 at p. 259.

"In cases of settlements, if there is reason to collect, however loose and ambiguous the language may be, that all the children of the marriage were intended to take, then, although there may be words which go to express that those only shall take who shall be living at the death of the parent, the Court holds that all the children who attained the age of twenty-one, although they died in the lifetime of the parent, shall take. A gift by will differs from the case of a trust declared by a settlement, because in the former there is no supposition that any persons can be intended to take except those who are described as takers:" per Shadwell, V.-C., *Tucker* v. *Harris* (1832), 5 Sim. 538 at p. 543.

"In this case the grandfather is providing for his children and grandchildren in such a manner as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing . . . portions for his several grandchildren. . . . Whereas, in the case of ordinary instruments, an express estate thereby limited cannot be enlarged except by necessary inference, yet upon instruments of this description, there is an implication of law arising upon the instrument itself, subject of course to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one (or as is usually provided in the case of daughters), upon their attaining twenty-one or marriage;

and that such portions shall then vest, whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents should have been contemplated as depriving them of the whole of the portion intended for their benefit:" per Wood, V.-C., *Swallow* v. *Binns* (1855), 1 K. & J. 417 at pp. 424, 425.

"The case of *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208, originally established the strong and unrebuttable [*sic, sed quaere*] presumption that in marriage settlements the shares of children are intended to become vested when they are wanted; that is to say, in the case of sons at twenty-one, and of daughters at twenty-one or marriage:" per James, V.-C., *Re Wilmott's Trusts* (1869), L. R. 7 Eq. 532 at p. 537.

"If there be any doubt as to the meaning of the words used, the Court must struggle to put such a construction upon the settlement as will let in all the children of the marriage who attained twenty-one years, whether they did so in the lifetime of their parents or not:" per Hall, V.-C., *Jeyes* v. *Savage* (1875), L. R. 10 Ch. 555 at p. 558, n., where the cases are commented on.

"There is a series of authorities which establishes that, as regards marriage settlements, and also as regards post-nuptial settlements containing a recital of an intention to provide for all the children of a marriage, you are not as a general rule to read the instrument in such a way as to make the provision for a child depend on surviving both parents. But it is laid down, both by Sir William Grant in *Howgrave* v. *Cartier* (1814), 3 V. & B. 79, and by Lord Cottenham in *Whatford* v. *Moore* (1836), 3 My. & Cr. 270, that if the settlement clearly and unequivocally makes the right to a provision depend on survivorship, then the rule does not apply. What is 'clear' and 'unequivocal' is very difficult to say. What is clear to one mind might not be so to another. In the last case on the subject, *Jeyes* v. *Savage* (1875), L. R. 10 Ch. 555, the Court of Appeal differed from Vice-Chancellor Hall, and such differences of opinion must always occur in construing ambiguous instruments. But the Lord Justice James in that case cites with approval a passage from the judgment of Lord Cottenham in *Whatford* v. *Moore* (1836), 3 My. & Cr. 270, the concluding words of which are these:—'The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule, which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument

affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used.' I think that is a sensible rule. When you find fair ground for doing so, then, in marriage settlements and post-nuptial settlements containing a recital of an intention to provide for all the children of a particular person or particular persons, you are to lean to that construction which includes them all; but you are not to have recourse to old authorities to overcome the plain meaning of the words used:" per Jessel, M.R., *Day* v. *Radcliffe* (1876), 3 Ch. D. 654 at p. 657.

"The primary Court decided that W. took a vested interest on attaining twenty-one, which was not contingent on his surviving his parent and not defeated by his decease in the lifetime of his father. . . . A long line of decisions has brought down to us from the time of Lord Hardwicke a rule of construction applicable to and which ought to guide us on such a question as that now before us. . . . The rule then being that in the construction of a settlement such as that before us there is a presumption that the settlor providing for his unborn children intended that according to ordinary practice their portions should become vested at twenty-one or marriage, we have to examine and see whether there is to be found in this settlement any clear language evidencing an intention to depart from this practice and make the right of the child consequent upon his surviving both parents:" per Lord Fitzgerald, *Wakefield* v. *Maffet* (1885), 10 Ap. Ca. 422 at p. 434.

In the following cases children who attained twenty-one or married were held to be indefeasibly entitled to portions notwithstanding a gift over on death before payment: where the portions were raisable (i.) out of realty: *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208 (due and payable); *Cholmondeley* v. *Meyrick* (1758), 1 Eden. 77 (due and payable); *Willis* v. *Willis* (1796), 3 Ves. 51 (payable); *Fry* v. *Lord Sherborne* (1829), 3 Sim. 243 (payable); and (ii.) out of personalty: *Jeffreys* v. *Reynous* (1767), 6 Bro. P. C. 398, stated 9 Ves. 311, 3 Sim. 258 (assignable, transferable); *Schenck* v. *Legh* (1804), 9 Ves. 300, the settlement is more fully stated 5 Ves. 452 (payable, assignable, or transferable); *Mocatta* v. *Lindo* (1837), 9 Sim. 56 (payable, without leaving issue); *Re Williams* (1849), 12 Beav. 317; 19 L. J. Ch. 46 (entitled to payment, assignment, or transfer); *Re Yates* (1851), 21 L. J. Ch. 281 (entitled in possession); *Jopp* v. *Wood* (1860), 28 Beav. 53; 2 De G. J. & S. 323 (entitled to their shares); *Wakefield* v. *Maffet* (1885), 10 Ap. Ca. 422 (payable); *Cobden* v *Bagwell* (1886), 19 L. R. Ir. 150 (payable).

In *Currie* v. *Larkins* (1864), 9 L. T. N. S. 638; 10 Jur. N. S. 8;

on app. 4 De G. J. & S. 245; 12 W. R. 515, there was a declaration that the shares should become vested and transmissible interests in sons at twenty-one, in daughters at twenty-one or marriage, "which shall first happen after the decease of the survivor of" the parents: it was held that these latter words did not make it necessary for a child to survive the parents in order to take a vested interest; and accordingly the representatives of a son who attained twenty-one and died in the life of the surviving parent, took a share.

When no reference to age or marriage.

As to whether the time of attaining twenty-one or of marrying will be held to be the time of indefeasible vesting in cases in which there is no reference to that time in the settlement: see *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198 at p. 207; *Remnant* v. *Hood* (1860), 2 De G. F. & J. 396, per Turner, L.J., at pp. 413, 414; and *Reilly* v. *Fitzgerald* (1843), Dru. 122; 6 Ir. Eq. R. 335 (where there was only one child, and the trusts in that event made no reference to time).

Gift over if no child, or if all children die in parents' life.

Where the gift over is if there is no child, or if all the children should die in the parents' lifetime:—*semble*, if the words are plain they must prevail. See *dictum* in *Schenck* v. *Legh* (1804), 9 Ves. 300 at p. 312. There was a clause to this effect in the settlement in *Currie* v. *Larkins* (1864), 4 De G. J. & S. 245, but no question arose on it.

Rule does not apply if issue of child dying before distribution take originally, or by substitution

The rule does not apply to cases where the original gift includes the issue of children dying before the period of distribution, or the issue of such children are substituted for their parents.

Settlement of personalty after life interests, for J., a child of a former marriage, and all the children of the marriage in equal shares, and, if any should be dead leaving issue, for such issue, sons at twenty-one and daughters at twenty-one or marriage: maintenance until the shares should become "payable as aforesaid." If J. or any child should die without issue before his share should become "due and payable," his share to be divided among the survivors and the issue of those dead when and as their original shares should become "due and payable." If neither J. nor any children nor issue should be living at the time of the decease of the survivor of the tenants for life, or if living they all died before their shares were payable, there was a gift over. J. having attained twenty-one died without leaving issue in the lifetime of the tenant for life. *Held*, he took nothing: *Re Wilmott's Trusts* (1869), L. R. 7 Eq. 532.

Settlement of personalty after life interests, to be transferred to daughters at twenty-one or marriage and sons at twenty-one—maintenance in the meantime. Proviso that if any such issue as aforesaid should die before they should become entitled to and actually receive their portions leaving issue, such issue to take their shares. Gift over if husband and wife should die without leaving any issue, or being such they should all die before they should respectively become entitled to receive their portions and without leaving issue. *Held*, that a son who attained twenty-one but died without having had issue in his father's lifetime, took no share: *Jeyes* v. *Savage* (1875), L. R. 10 Ch. 555.

Settlement of personalty after life interests, for the children of A. W. and the issue of such children, to be paid and transferred to the children, sons at twenty-one, daughters at twenty-one or marriage, and the issue of any children, whose parents should die before their shares should become payable, to be entitled to the shares their parents would have been entitled to if living. *Held*, that a child who attained twenty-one but died in the lifetime of A. W., leaving a child, took no share: *Day* v. *Radcliffe* (1876), 3 Ch. D. 654.

If issue only substituted for parents dying under twenty-one.

But probably the rule would be applied if the issue were substituted only for such parents as died before attaining twenty-one, and *Mocatta* v. *Lindo* (1837), 9 Sim. 56, can probably be supported on that ground: see per James, V.-C., *Re Wilmott's Trusts* (1869), L. R. 7 Eq. 532 at p. 538.

Where children must *survive*.

In many settlements the primary gift is to children who survive one or both parents, particularly by means of a trust for children in case the parents shall *leave* children surviving, and in such cases, if there are no further words, only those children who survive can take. "Where it is manifest upon the face of the settlement that the object of the parties is that no child shall take except in the event of its actually surviving both the father and mother, the Court has not indulged itself in the liberty of breaking through the express and plain words:" per Shadwell, V.-C., *Fry* v. *Lord Sherborne* (1829), 3 Sim. 243 at p. 254.

In all the following cases only such children as actually survived their parent or parents were held to be entitled: *Wingrave* v. *Palgrave* (1717), 1 P. Wms. 401; *Gordon* v. *Raynes* (1732), 3 P. Wms. 134; *Balmain* v. *Shore* (1804), 9 Ves. 500, a very peculiar case on partnership articles; *Hotchkin* v. *Humfrey* (1817), 2 Madd. 65; *Fitzgerald* v. *Field* (1826), 1 Russ. 416 at p. 430; *Whatford* v. *Moore* (1836), 3 My. & Cr. 270, a very special case; *Skipper* v. *King* (1848), 12 Beav. 29; *Jeffery* v. *Jeffery* (1849), 17 Sim. 26; *Lloyd* v.

Cocker (1854), 19 Beav. 140; *Re Heath* (1856), 23 Beav. 193; *Re Wollaston* (1860), 27 Beav. 642.

Courts lean towards reading *leave* as *have*;

But even in cases where the primary gift is to children surviving the parents, the Courts have been astute in discovering in other parts of the settlement, and particularly in gifts over, (i.) an indication that all children who attain twenty-one, or, being daughters, marry, are to take, whether any child survives the parents or not; and (ii.) in cases where it is clear that one child must survive, an indication that, if one child does survive, all the children who attain twenty-one, or being daughters marry, are to take, whether they survive the parents or not.

and letting in all if one survives.

Leave read *have*.

The first branch of the proposition is often shortly expressed by stating that the word *leave* is read *have* by force of the gift over or otherwise.

The following are cases on the first branch of the proposition :—

A father directed that trustees should, out of the rents and profits of lands conveyed to them, if his daughter and her husband should leave at the death of the survivor any child or children, raise 200*l.* per annum for maintenance of such child or children until they should attain the age of twenty-one years, and then raise the sum of 5,000*l.* and pay the same to such children in equal shares upon their attaining twenty-one, and if there should be but one child, then to such child. *Held*, that a child who attained twenty-one, but died in the lifetime of her mother took a share, Lord Thurlow, C., saying: "There is no word used to exclude" the child in question, "but the word *such*, upon which it might have been contended that the property should not vest unless the children were infants at the decease of the survivor. Though the words are strong and difficult to manage, the intention of the settlement is the truth and honour of the case:" *Woodcock* v. *Duke of Dorset* (1792), 3 Bro. C. C. 569.

Term limited in trust after the father's decease in case he shall leave a younger child, to raise portions to be paid at twenty-one or marriage, with a provision for advancement in the father's life by his direction, and survivorship upon the death of any child before the portion should be payable, and if there shall be no such children, or all die before the portions become payable, not to be raised. *Held*, by Lord Eldon, C., that the portions vested in an only younger child indefeasibly at twenty-one: *Powis* v. *Burdett* (1804), 9 Ves. 428.

Settlement of personalty after life interests "in case there shall happen to be any child or children *living* who shall be of the age of twenty-one years," then for such children at twenty-one as the wife

should appoint, and in default as the husband should appoint, and in default "for such children at twenty-one, and in case there shall be no such child, or they shall die before any of them shall attain twenty-one," then over. *Held*, by Sir William Grant, M.R., that the children's interests were indefeasibly vested at twenty-one: *Howgrave* v. *Cartier* (1814), 3 V. & B. 79; G. Coop. 66. Similar cases are: *Perfect* v. *Lord Curzon* (1820), 5 Madd. 442; *Torres* v. *Franco* (1830), 1 Russ. & My. 649; *Swallow* v. *Binns* (1855), 1 K. & J. 417; *Dixon* v. *Barkshire* (1865), 34 Beav. 537.

The following are examples of the second branch of the proposition:—

If one child survives, all take.

Trusts of a portions term in case there should be any younger children living at the time of the decease of the father, to raise portions for all and every the younger children to be paid, sons at twenty-one, daughters at twenty-one or marriage, or if that event happened in the father's lifetime, at his decease. Gift over of the portion of any child becoming an eldest son, before his portion should become payable, to the survivors, and proviso for cesser of term in case all the children entitled to portions die before their portions become payable. *Held*, by Lord Eldon, C., that a child who attained twenty-one, but died in the lifetime of the father, was entitled to a portion, some younger children having survived the father, and *semble*, if no younger child had done so: *Hope* v. *Lord Clifden* (1801), 6 Ves. 499.

Trust in case at the death of survivor of husband and wife, they shall leave any child or children and such child or children attain twenty-one, to convey to such child, if but one, and if there shall be more than one child who shall live to attain twenty-one, to convey to such children who shall attain twenty-one equally at twenty-one, with survivorship, and if both parents die without leaving any child, to the husband. *Held*, by Sir William Grant, M.R., that though some child must survive, yet if one child did so, all who attained twenty-one took: *King* v. *Hake* (1804), 9 Ves. 438. Similar cases are: *Mostyn* v. *Mostyn* (1844), 1 Coll. 161; *Gordon* v. *Hope* (1849), 3 De G. & Sm. 351; *Baillie* v. *Jackson* (1853), 1 Sm. & Giff. 175.

Settlement of personalty for E. for life, and after her death "leaving a child or children," to transfer the funds to "all and every the child and children of E. and the issue of such of the children as might be then dead" (issue to take a parent's share) equally, sons at twenty-one, daughters at twenty-one or marriage. *Held*, that, although the trust could only take effect in case one child survived E., that contingency was not to be imported into the constitution of the

class to take under the trust, and that a son who attained twenty-one, but died before E. without issue, took a vested interest: *Re Orlebar's Settlement Trusts* (1875), 20 Eq. 711.

Recapitulation.

To recapitulate:—

In the absence of clearly-expressed directions as to vesting:—

1. Where no time is named for payment of portions:—

(i.) If charged on land they vest in sons at twenty-one, in daughters at twenty-one or marriage, even if interim interest is given.

(ii.) If payable out of a personal fund they vest at birth.

2. Where payment of portions is postponed till an event personal to the portionist:—

(i.) If charged on land they do not vest unless and until the event happens, even if interim interest is given.

(ii.) If payable out of a personal fund they vest at birth.

(iii.) If payable out of a personal fund, only by a direction for payment on the event happening, they do not vest unless and until the event happens, even if interim interest is given.

3. In all the above cases the fact of the actual raising or payment of the portions being postponed for the convenience of the estate has no effect on their vesting.

4. In a settlement made by a parent or person *in loco parentis* the right of a child to a portion will not depend on its surviving its parent, unless the words clearly and unambiguously make the right so dependent.

CHAPTER XXVIII.

COVENANTS.

Meaning of Covenant: Executed or Executory: No special Words necessary to create Covenant: Declaration of Trust is Covenant: Covenant created by Recital: Admission of Debt by Recital is Covenant to pay: "It is hereby agreed and declared" that A. shall pay is Covenant by A. only: Covenants implied by Law when Deed otherwise inoperative: Assignment implying Covenant: Covenants implied by Words; by Relationship of Landlord and Tenant; by "Demise" and "Let": Express Covenants exclude Implication: Agreement under Seal for Deed to contain Covenant is Covenant: Ambiguous Words taken against Covenantor: Covenant not construed by Conduct of Parties: Proviso negativing Liability is void, secus if limiting Liability: Illegal Covenant is void; but if partly illegal, that part only void, if severable: Covenant with Penalty on non-performance: When Specific Performance decreed: Whether Penalty is Liquidated Damages: If Conditioned on one Event is Damages, if on more than one is Penalty: Recovery of Penalty is Satisfaction of Covenant: Bond or Covenant: Covenant operating as Assignment of Property: Assignment of Future Property is Covenant: Property must be Defined: All Future Property: When Assignee gets Possession he gets a Legal Title: Covenant to observe Covenants and indemnify is a Covenant of Indemnity only: Covenant with Oneself is Nugatory: Covenant not to revoke Will: Two Covenants to settle, first is binding.

Meaning of covenant.

ALTHOUGH the word "covenant," in its strict sense, means an agreement under seal, that something has, or has not, already been done, or shall, or shall not, hereafter be done (Shep. Touch. 160, 162), it is sometimes, especially in agreements, applied to any promise or stipulation, whether under seal or not: *Hayne* v. *Cummings* (1864), 16 C. B. N. S. 421; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52, where the word "covenant" in an agreement was held to include a proviso.

Covenant is executed or executory.

A covenant may be executed, *i.e.*, that a thing "has, or has not, been done;" *e.g.*, that A. has not incumbered; or executory, *i.e.*, that something "shall, or shall not, be done;" *e.g.*, that A. will execute a further assurance.

No special words necessary to create covenant.

No particular form of words is necessary to create a covenant.

"There needs not formal and orderly words as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made, may have this action upon the breach of the agreement:" Shep. Touch. 162; Com. Dig. Covenant A. 1 and 2.

"Wherever the intent of the parties can be collected out of a deed for doing or not doing a thing, covenant will lie:" per Nottingham, C., *Hill* v. *Carr* (1676), 1 Ca. Ch. 294; S. C. *sub nom. Hollis* v. *Carr*, 2 Mod. 86, *sub nom. Holles* v. *Carr*, 3 Swan. 638.

"No particular technical words are necessary towards making a covenant:" per Lord Mansfield, C.J., *Lant* v. *Norris* (1757), 1 Burr. 287 at p. 290.

"It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words in a deed which *show an agreement* to do a thing make a covenant' (Com. Dig. Covenant, A. 2); but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification: Com. Dig. Covenant, A. 3; 1 Roll. Abr. 518, pl. 3, 4:" per Lord Denman, C.J., *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644 at p. 657.

"To charge a party with a covenant, it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent:" per Tindal, C.J., *Courtney* v. *Taylor* (1843), 6 M. & Gr. 851 at p. 867; 7 Scott, N. R. 749 at p. 765.

"It is undoubted law that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose which show an intention to be bound by the deed to do or omit that which is the subject of the covenant; any such words are sufficient, and some such words are necessary, to make a

covenant:" per Curiam, *Rashleigh* v. *South-Eastern Ry. Co.* (1851), 10 C. B. 612 at p. 632.

"I take it to be clear that any form of words which, when properly construed, with the aid of all that is legitimately admissible to aid in the construction of a written document, indicate an agreement forms, when under seal, a covenant:" per Lord Blackburn, *Russell* v. *Watts* (1885), 10 Ap. Ca. 590 at p. 611.

"No formal words are necessary to make a covenant in such a deed" (*i.e.*, conveyance on sale). "A statement of a binding intention on the part of the vendors who execute the deed, made on the face of it for the purpose of inducing the several purchasers to buy, is as good a covenant as could be made by the most formal words:" per Kay, J., *Mackenzie* v. *Childers* (1890), 43 Ch. D. 265 at p. 275.

But the Court must "be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done:" per Parke, B., *James* v. *Cochrane* (1852), 7 Exch. 170 at p. 177.

Agreement under seal must amount to covenant.

On the other hand the parties cannot stipulate that an agreement under seal shall not create a covenant. In *Ellison* v. *Bignold* (1821), 2 J. & W. 503 (see at p. 510), certain parties "resolved and agreed and did, by way of declaration and not of covenant, agree," and it was held that they had covenanted.

"Upon condition."

Lease "upon condition that" the lessee shall do certain things; this is a covenant by the lessee: Y. B. 40 Edw. III. (1366), 5 b; 4 Cru. Dig. Tit. 32, Ch. 26, s. 6; 1 Roll. Abr. 518, pl. 5.

"I will be ready to."

"I have in my hands a writing obligatory, and I will be ready at all times to re-deliver the same writing obligatory to B." *Held*, a covenant to do so: *Walker* v. *Walker* (1636), 1 Roll. Abr. 519, pl. 8.

"I oblige myself to pay." *Held*, a covenant to pay: *Norrices' Case* (1661), Hardr. 178.

Warranty.

Conveyance in fee with clause of warranty; eviction on prior title for years; the grantee can bring covenant on the warranty: *Pincombe* v. *Rudge* (1608), Hob. 3, and further stated in *Roll* v. *Osborn* (1612), Hob. 20 at p. 28; S. C. *sub nom. Rudg* v. *Pincombe* (1615), 1 Roll. Rep. 25; *Williamson* v. *Codrington* (1750), 1 Ves. Sen. 511. A warranty in a lease for years is a covenant: Shep. Touch. 163.

Proviso.

A proviso may amount to a covenant, or it may be merely a qualification of the preceding covenant. If a lessee for years covenants to repair, provided always and it is agreed that the lessor

shall find timber: the word "agreed" operates as a covenant to find timber: if this word had been omitted it would only have operated as a qualification of the covenant by the lessee (*sed quaere* this latter proposition, see next paragraph): *Holder* v. *Tayloe* (1615), 1 Roll. Abr. 518. See Co. Litt. 203 b; Shep. Touch. 122; *Thomas* v. *Cadwallader* (1744), Willes, 496.

"Slates being found, allowed, and delivered on the premises by A." *Held*, to amount to a covenant by A. to deliver them: *Mucklestone* v. *Thomas* (1739), Willes, 146.

"Doing," &c. "Doing, fulfilling, and performing:" *Boone* v. *Eyre* (1779), 2 W. Bl. 1312; "doing suit to the mill:" *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410. *Held*, to amount to covenants.

"Yielding and paying." "Yielding and paying" rent has been held to amount to a covenant to pay it; see Platt on Covenants, Ch. 2, s. 3; *Newton* v. *Osborn* (1653), Styl. 387; *Porter* v. *Swetnam* (1654), Styl. 406; *Hellier* v. *Casbard* (1666), 1 Sidf. 240, 266; *Harper* v. *Burgh* (1678), 2 Lev. 206; S. C. *sub nom. Harper* v. *Bird*, T. Jo. 102; *Webb* v. *Russell* (1789), 3 T. R. 393 at p. 402; *Iggulden* v. *May* (1804), 9 Ves. 325 at p. 330; *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410.

"Rendering." "Rendering" rent free and clear from all manner of taxes, charges, and impositions whatsoever. *Held* to amount to a covenant to pay the rent free from all taxes, &c.: *Giles* v. *Hooper* (1690), Carth. 135.

"Being." Covenant by lessee "to repair and glaze the windows of the messuage and also the hedges, ditches, &c., the said farmhouse and buildings being previously put in repair and kept in repair by" the lessor. *Held*, to amount to a covenant by the lessor to put into repair: *Cannock* v. *Jones* (1849), 3 Exch. 233.

"To be paid." "To be paid." *Held*, a covenant to pay: *Bower* v. *Hodges* (1853), 13 C. B. 765.

"Declares." Where a person by deed "declares" that he will do a thing, it amounts to a covenant by him to do it: *Richardson* v. *Jenkins* (1853), 1 Drew. 477 at p. 483.

"Excepting." Lease of a house "excepting two rooms and free passage to them." The assign of the lessee disturbed the lessor in the passage. *Held*, that he was liable in an action of covenant: *Bush* v. *Cole* or *Coles* (1692), Carth. 232; 12 Mod. 24; S. C. *sub nom. Bush* v. *Calis*, 1 Show. 388; *sub nom. Cole's Case*, 1 Salk. 196.

Words of exception. Covenant by lessee to plough the demised premises, except the warren, in due course of husbandry. *Held*, to imply a covenant not to plough the warren: *St. Albans* v. *Ellis* (1812), 16 East, 352.

In a lease of station refreshment rooms by defendant company to plaintiff, it was declared to be the intention of the defendant company that all trains passing should stop at the station, and the defendant company engaged not to do any act which should have an effect contrary to that intention. *Held*, to be a covenant by defendant company not to prevent trains stopping: *Rigby* v. *Great Western Railway* (1845), 14 M. & W. 811.

In an agreement for a lease of trade premises it was provided, "that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term should be bought and purchased of the defendants, provided the defendants could and should supply him with the quantity that should from time to time be required by him, or to such extent as the defendants could supply; and that the defendants should charge for the same at a given price and no more; and further that the defendants should not be compelled to supply more than 500 tons per week; and that in case the defendants should from some substantial cause be unable to supply coal to the extent agreed upon, they should give the plaintiff six months' notice of such their inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity that the defendants could supply, from any other source. *Held*, that this amounted to a covenant by the defendants to supply the plaintiff with coal to the extent of 500 tons per week, unless prevented by some substantial cause: *Wood* v. *Copper Miners* (1849), 7 C. B. 906.

An agreement that the plaintiff should receive a salary of 100*l.* a year is an agreement to employ him for a year certain: *Emmens* v. *Elderton* (1852), 4 H. L. C. 624; or rather to pay him wages for that time: *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *Turner* v. *Sawdon*, [1901] 2 K. B. 653.

Restriction by way of use.

Conveyance in fee, with a restriction by way of use against carrying on certain trades. *Held*, to amount to a covenant not to carry them on: *Hodson* v. *Coppard* (1860), 29 Beav. 4; S. C. *sub nom. Hodgson* v. *Coppard*, 30 L. J. Ch. 20.

"Subject to" payment.

But an assignment of a lease "subject to" the payment of the rent and performance of the covenants in the lease by the assignee does not imply a covenant by the assignee to indemnify the assignor against the rent (*i.e.*, after the assignee had assigned over): *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644.

Stipulation negativing obligation.

A stipulation merely negativing an obligation is not a covenant. Thus a clause in a settlement that trustees "should not be chargeable for any money, but what they should actually receive," does not

make a specialty debt of what they do receive: *Bartlett* v. *Hodgson* (1785), 1 T. R. 42.

Clause introduced by participle qualifying preceding covenant.

But a clause introduced by a participle, or the words "to be," may amount only to a qualification of the covenant with which it is connected.

Covenant by lessee to repair, "the lessor allowing and assigning timber for repairs." *Held*, to amount to a qualification of the covenant to repair: *Thomas* v. *Cadwallader* (1744), Willes, 496; but cf. *Mucklestone* v. *Thomas* (1739), Willes, 146; *supra*, p. 486.

Covenant by lessee not to assign without the lessor's consent, such consent "not being arbitrarily withheld:" *Treloar* v. *Bigge* (1874), L. R. 9 Ex. 151; "not to be unreasonably withheld:" *Sear* v. *House Property and Investment Society* (1880), 16 Ch. D. 387. *Held*, that the words amounted only to a qualification of the covenant by the lessee.

Declaration of trust is a covenant.

A declaration of trust is equivalent to a covenant.

Thus, though a breach of trust of itself creates only a simple contract debt: *Vernon* v. *Vawdry* (1740), 2 Atk. 119; *Cox* v. *Bateman* (1750), 2 Ves. Sen. 19; a declaration of trust contained in a deed, executed by the trustee, makes it a specialty: *Benson* v. *Benson* (1710), 1 P. Wms. 130; *Mavor* v. *Davenport* (1828), 2 Sim. 227; *Wood* v. *Hardisty* (1846), 2 Coll. 542; even if contained in a deed poll: *Turner* v. *Wardle* (1834), 7 Sim. 80; but the deed must be executed by the trustee; mere acting under it is not enough: *Richardson* v. *Jenkins* (1853), 1 Drew. 477; and it must contain a declaration of trust, a declaration that the trustee accepts the office is not sufficient: *Adey* v. *Arnold* (1852), 2 De G. M. & G. 432; *Wynch* v. *Grant* (1854), 2 Drew. 312; *Isaacson* v. *Harwood* (1868), L. R. 3 Ch. 225; *Holland* v. *Holland* (1869), L. R. 4 Ch. 449.

A recital may create a covenant.

A recital may create a covenant; but if there be an express covenant to which the recital can be referred, the words of the express covenant must be taken to supersede the covenant which, in their absence, might have been implied from the recital.

"Where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these

inferred a covenant to do such acts:" per Lord Denman, C.J., *Aspdin* v. *Austin* (1844), 5 Q. B. 671 at p. 683.

"There can be no question that a recital in a deed may amount to a covenant, but it must be plain upon the whole deed that it was so intended:" per Sullivan, M.R., *Borrowes* v. *Borrowes* (1872), Ir. R. 6 Eq. 364 at p. 378.

"There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject matter:" per Jessel, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354 at p. 359.

A recital that something is intended to be done amounts to a covenant to do that thing, and a recital of a state of facts amounts to a covenant that that state of facts exists.

Examples.

Where the condition of a bond contained a recital that the plaintiff had covenanted with the defendant that it should be lawful for the defendant to cut wood for fire-bote without making waste or cutting more than necessary, and the condition was to perform all covenants and agreements, it was held, in an action by the plaintiff against the defendant for waste in felling wood, that the defendant was bound: *Stevinson's Case* (1587), 1 Leon. 324, pl. 457; 12 East, 182, n.

Recital in a deed poll by A. that he was possessed of certain lands for a certain term of years, and that by good and lawful conveyance he assigned the same to B., with divers covenants, articles, and agreements in the said deed contained which are or ought to be performed on his part; and the condition of the deed poll was to perform, &c. *Held*, that, unless A. had that interest, the condition was broken: *Severn and Clerk's Case* (1588), 1 Leon. 122. See Rawle on Covenants, 479.

Recital in a lease of a mine, that before the sealing of the indenture it was agreed that the plaintiff should have the third part of the coals digged. *Held*, to amount to a covenant to render them: *Barfoot* v. *Freswell* (1676), 3 Keb. 465.

Recital in marriage articles of an agreement to levy a fine. *Held*, to amount to a covenant to levy a fine: *Hollis* v. *Carr* (1676), Freem. Ch. 3; 2 Mod. 86; 3 Swan. 638.

Recital in marriage articles, that the defendant was to pay to the plaintiff 1,000*l.* for the marriage portion of the wife. *Held*, to amount to a covenant to pay that sum: *Graves* v. *White* (1680), Freem. Ch. 57.

Recital in a partnership deed, executed on the retirement of one partner, of an agreement, "that the debts and credits of the retiring

partner shall be received and paid by the continuing partners." *Held*, to amount to a covenant by the continuing partners to pay the debts of the retiring partner: *Saltoun* v. *Houstoun* (1824), 1 Bing. 433.

Recital in a lease of an agreement by the lessee with the lessor and other parties for pulling down an old mill and building another of larger dimensions, followed by a covenant to keep such new mill, and leave it at the end of the term, in repair. *Held*, that there was an implied covenant to build it: *Sampson* v. *Easterby* (1830), 9 B. & C. 505; 6 Bing. 644.

Recital that defendant had agreed to pay off certain mortgages and debts of W., and covenant by defendant to save harmless and indemnify against the payment of the said debts. *Held*, to amount to a covenant to pay the debts as well as to indemnify: *Carr* v. *Roberts* (1833), 5 B. & Ad. 78.

Recital in a mortgage, that it had been agreed between the mortgagor and mortgagee that the mortgagee should be at liberty to sign judgment in an action commenced against the mortgagor, "but that no execution shall issue thereon until this present security be realised." *Held*, to amount to a covenant by the mortgagee not to issue execution till the realisation of the security: *Farrall* v. *Hilditch* (1859), 5 C. B. N. S. 840.

In a marriage settlement there was a recital that the wife's father was desirous to give his daughter as a marriage portion such sum or child's share as he might be entitled to dispose of; and the intended husband, who had power to jointure to the amount of 10 per cent. on the fortune which he should receive with his wife, in consideration of the marriage and of the portion agreed to be paid as thereinbefore stated, appointed a jointure of 500*l.* a year, which was also collaterally secured on other lands not subject to the power. *Held*, that the recital amounted to an absolute covenant by the father that his daughter should have on his death a share of his personal estate equal to that of each of his other children: *Duckett* v. *Gordon* (1860), 11 Ir. Ch. R. 181.

Recital in a creditors' deed that the debtor had agreed to pay a certain composition on his debts, followed by a release by the creditors. *Held*, to amount to a covenant to pay the composition: *Lay* v. *Mottram* (1865), 19 C. B. N. S. 479.

A deed of mutual covenants, executed by purchasers on purchase of plots on a building estate, and also executed by the vendors, contained a recital that it was intended to be a part of all future contracts for sale of the plots that the several purchasers should execute

the deed and be bound by the stipulations contained in it. *Held*, that such recital was a covenant by the vendors not to sell the unsold plots on other conditions. "A statement of a binding intention on the part of the vendors . . . is as good a covenant as could be made by the most formal words:" per Kay, J., *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265 at p. 275.

Recital in a separation deed that the husband and wife had agreed to live apart. *Held*, that a covenant by the wife to live apart ought to be implied: *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164.

Admission of debt by recital is covenant to pay.

A mere admission of a debt by a recital (even in a deed poll: *Turner* v. *Wardle* (1834), 7 Sim. 80), where the recital has no other object, implies a covenant for payment: *Brice* v. *Carre* or *Curr* (1662), 1 Lev. 47; 1 Keb. 155; per Romilly, M.R., *Marryat* v. *Marryat* (1860), 28 Beav. 224 at p. 226; per Lord Cairns, C., *Isaacson* v. *Harwood* (1868), L. R. 3 Ch. 225 at p. 228; and per Malins, V.-C., *Jackson* v. *N. E. Ry. Co.* (1877), 7 Ch. D. 573 at p. 583.

Unless made for another purpose.

But such a recital does not so operate where it is made for some other purpose; *e.g.*, to show what is intended to be secured by the deed. Accordingly, recitals that a debt is due, in the transfer of a mortgage: *Courtney* v. *Taylor* (1843), 6 M. & Gr. 851; or in an assignment for the benefit of creditors: *Iven* v. *Elwes* (1854), 3 Drew. 25; or in an assignment for the benefit of a single creditor: *Stone* v. *Van Heythuysen* (1854), Kay, 721; or in a mortgage to secure the debt: *Marryat* v. *Marryat* (1860), 28 Beav. 224; *Isaacson* v. *Harwood* (1868), L. R. 3 Ch. 225; or in a conveyance in trust to secure it: *Jackson* v. *N. E. Ry. Co.* (1877), 7 Ch. D. 573; were held not to turn the debt into a specialty.

In *Cheslyn* v. *Dalby* (1840), 4 Y. & C. Ex. 238, the recital was taken to amount to a covenant to pay, although it had another object also.

If the recital be followed by an agreement under seal to execute a mortgage "including all powers, covenants, and clauses incidental and necessary thereto," the debt is a specialty: *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573.

Where a deed of assignment contained a recital of an agreement for the transfer of certain property "for the sum of 1,000*l.*,"

followed by the usual acknowledgment of the receipt of the 1,000*l.*, which, however, was not in fact paid, it was held that no covenant to pay the 1,000*l.* could be implied in the face of the acknowledgment: *Morgan's Patent Anchor Co.* v. *Morgan* (1877), 35 L. T. 811. Amphlett, B., at p. 813, said: "The question is whether, as the deed stands, a court of law can say that there is by implication a covenant to pay a certain sum of money, when the same deed says that the money has been already paid. I do not think that it can."

It is hereby agreed and declared, followed by statement that one is to act, is a covenant by that one only.

Where, in a clause commencing "it is hereby agreed and declared," it is stated that a person, party to the deed, is to do a thing, the only covenant is by such person.

"It appears to me that in effect the words 'it is hereby agreed and declared' operate thus: they operate to show that what is comprised in the clause of which these words are the commencement, is what all parties intend and agree shall be done; and whatever you find in the clause is agreed to be done by any given party, it is an agreement that that party is to do it; but the party who is to do the thing is the person who is alone bound to perform that agreement:" per Kindersley, V.-C., *Ramsden* v. *Smith* (1854), 2 Drew. 298 at pp. 307, 308.

"The rule is that where you have such words as 'it is hereby agreed and declared between and by the parties to these presents' that some one will do an act or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. Anything more absurd than to hold it was a covenant by all of them could not be imagined:" per Jessel, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354 at p. 359.

Covenants are only implied where the deed would otherwise be inoperative.

The Court will imply a covenant, where the deed would be inoperative unless such covenant is implied, but not otherwise.

"The doctrine [as to implied agreements] which is to be collected from the cases, is involved in much difficulty. It is not always possible to see what is and what is not sufficient to raise an implied agreement. This, however, is a plain, intelligible, sensible, and settled rule that, whereas you ought never to imply a covenant against the intention of the parties, so it goes further, and you ought not to imply an agreement unless, in the fair and honest

construction of the deed, it appears that it was the intention of the parties, or unless it is absolutely necessary, to imply it; and when it is said you ought not to imply a covenant unless it is necessary, that must be taken to mean when it is necessary, in order to carry into effect the intention of the parties, that it should be implied; and that means, not the intention of the parties merely that payment should be made, but their intention that the deed should operate by way of agreement to pay:" per Kindersley, V.-C., *Iven* v. *Elwes* (1854), 3 Drew. 25 at p. 34.

"The parties have entered into a contract to do certain things upon the assumption that certain necessary assents would first be obtained; but there is no provision, express or implied, to show that either of them took upon themselves the accomplishment of that preliminary step. That being so, it is not competent to the Court to make a contract for the parties which they have not thought fit to make for themselves or to import a covenant which does not arise by fair and necessary implication from the language they have used:" per Cockburn, C.J., *Smith* v. *Mayor, &c., of Harwich* (1857), 2 C. B. N. S. 651 at p. 669.

"I have for a long time understood that rule" (*i.e.*, as to implying covenants) "to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned:" per Lord Esher, M.R., *Hamlyn* v. *Wood* [1891] 2 Q. B. 488 at p. 491. "I agree with the rule as laid down by the Master of the Rolls, viz., that the Court ought not to imply a term in a contract, unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable in principle:" per Kay, L.J., *Ibid.*, at p. 494.

Covenant implied from whole deed.

In the following cases on the construction of the whole deed a covenant was implied.

By deed it was agreed between A. and B. "that A. shall give 775*l.* to B. for his lands, &c., the money to be paid before midsummer." *Held*, that the words amounted to a covenant by B. to convey the

lands, &c.: *Pordage* v. *Cole* (1670), 1 Wms. Saund. 319 l (ed. 1871, vol. 1, p. 548).

Agreement in a charter-party that "forty days shall be allowed for unloading and loading again." *Held*, that a covenant not to detain the ship more than forty days for loading must be implied: *Randall* v. *Lynch* (1810), 12 East, 179.

Covenant by a lessee that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a certain price and for certain purposes. *Held*, to imply a covenant by him to burn lime at all such seasons: *Shrewsbury* v. *Gould* (1819), 2 B. & Ald. 487.

Covenant in a lease that the tenant should fold "his flock of sheep which he should keep on the demised premises." *Held*, that this amounted to a covenant to keep a flock of sheep on the premises: *Webb* v. *Plummer* (1819), 2 B. & Ald. 746.

Covenant by plaintiff to supply 350,000 sleepers "as and when and in such quantities as the engineer should require," and covenant by defendants to pay for sleepers hereinbefore contracted to be supplied. *Held*, to amount to a covenant to take the whole number of sleepers: *Great Northern Railway* v. *Harrison* (1852), 12 C. B. 576.

Specification that contractor will be required to sink the well, &c., to a depth of 120 feet, &c., after which the company will undertake the erection of the permanent engine and permit the pumping to be performed by it. *Held*, that there was a covenant by the company to erect the engine: *Knight* v. *Gravesend, &c., Co.* (1857), 2 H. & N. 6.

Grant of an annuity to commence on grantor's death and charge on lands of which grantor was in fact only tenant for life, covenant by grantor that if annuity became in arrear annuitant might distrain. *Held*, in D. P. (Lord St. Leonards *diss.*) that grantor's estate was liable in covenant for payment of the annuity: *Monypenny* v. *Monypenny* (1861), 9 H. L. C. 114.

Agreement for sale of medical practice; payment to be by means of profits earned during four years. *Held*, to imply an agreement by the purchaser that he would not by his wilful acts or default prevent the receipt of earnings: *MacIntyre* v. *Belcher* (1863), 14 C. B. N. S. 654.

Agreement for sale of business, the purchase-money to be payable by instalments contingent on the amount of the profits of the business. *Held*, that, as the amount of purchase-money depended on the profits of the business, there was an implied covenant by the

purchasers to carry it on: *Telegraph Despatch and Intelligence Co.* v. *McLean* (1873), L. R. 8 Ch. 658.

Agreement by plaintiff to act as musical director of the defendants' theatre for three years, upon certain terms as to salary, with a provision that his name should be announced in certain newspapers and on bills and programmes. There was no express stipulation in the agreement that the defendants would employ the plaintiff as conductor, but it appeared in evidence that the most important duty of a musical director is to conduct the orchestra. *Held*, to imply a covenant by the defendants to employ plaintiff in that capacity, and not merely to pay him a salary: *Bunning* v. *Lyric Theatre, Ltd.* (1894), 71 L. T. 396; cf. *Turner* v. *Sawdon*, [1901] 2 K. B. 653.

Agreement by wholesale dealers that for a period of four years they would distribute among their customers, the retailers, by way of bonus, a proportion of the annual profits. *Held*, that it was an implied term that they would carry on business for the full period of four years, and would not during that period do any act disabling themselves from earning profits: *Ogdens, Ltd.* v. *Nelson*, [1903] 2 K. B. 287; [1904] 2 K. B. 410; [1905] A. C. 109.

Covenant not implied from whole deed.

In the following cases on the construction of the whole deed no covenant was implied.

The plaintiff covenanted with the defendant that D. should for five years from that date serve the defendant in the art of a surgeon dentist, and attend for nine hours each day; and the defendant in consideration of the services to be done by D., covenanted with the plaintiff that the defendant would during the five years, in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise, pay to D. certain weekly sums. D. remained for some time in the defendant's service and faithfully performed his part of the agreement, but defendant during the term dismissed D. *Held*, that there was no implied covenant that the defendant would allow D. to serve him during the whole of the term: *Dunn* v. *Sayles* (1844), 5 Q. B. 685.

The plaintiff conveyed two pieces of land to a railway company, subject to the performance by them of certain agreements therein recited, being to the same effect as the covenants contained in the deed hereinafter stated, and one of the pieces of land was described as "a slip of land then being intended to be formed into a new course for the river Beult;" and by deed of even date the company covenanted with the plaintiff to make a new bridge over the intended new cut for the use of the plaintiff within three months after the

permanent rails of the railway should be laid down; and after the same should be completed, to reconvey to the plaintiff the slip of land which should form the new course of the river Beult, so far as the same should be diverted; and also to fill up and level the then existing course of the river Beult so far as the same should have been diverted. *Held*, that there was no implied covenant to make a new cut and divert the stream: *Rashleigh* v. *South Eastern Railway Co.* (1851), 10 C. B. 612.

Lease of coal mines. Covenant by lessees to bring to bank at some of the pits of the mine (being pits from which the coal should not be worked by out-stroke) all manure arising in the mine. *Held*, that no covenant could be implied binding the lessees to sink a pit on the land: *James* v. *Cochrane* (1853), 7 Exch. 170, on app. 8 Exch. 556.

By deed, A. and B., who were partners, assigned to the plaintiffs all the partnership stock, debts, and sums of money, and all other the personal estate and effects and property of them as such partners. At the date of the deed, A. was indebted to the partnership. *Held*, that there was no implied covenant by A. to pay to the plaintiffs the sums due from him to the partnership: *Aulton* v. *Atkins* (1856), 18 C. B. 249.

By deed a corporation agreed with a contractor that he should make certain works, which the corporation were empowered by Act of Parliament to make, at a certain price, subject to the following provisions, namely (*inter alia*) "that the assent of the Commissioners of Woods and Forests shall be given to the said Mayor, &c., to carry out the said works so far as the same affect the land or soil of the Crown." *Held*, that no covenant was implied on the part of the corporation to obtain the assent of the Commissioners: *Smith* v. *Mayor, &c., of Harwich* (1857), 2 C. B. N. S. 651.

A. effected a policy on his own life, by the terms of which policy certain funds only, in exoneration of the shareholders, were liable to answer claims on the company. The company ceased to carry on business. *Held*, in an action by the insured, that there was no implied covenant by the company to continue to carry on the business: *King* v. *Accumulative Assurance Co.* (1857), 3 C. B. N. S. 151.

A deed of arrangement under which a landowner agreed that certain refuse should be allowed to go upon his land, he receiving for his own use the refuse "which may from time to time be found" on the land. *Held*, that there was no covenant compelling the owner of the refuse to send it on to the land: *Sharp* v. *Waterhouse* (1857), 7 El. & Bl. 816.

Contract to carry mails, the Admiralty Commissioners agreeing that they would pay out of moneys to be provided by Parliament by quarterly payments. *Held*, that there was no contract by the Commissioners to employ the contractor: *Churchward* v. *Reg.* (1865), L. R. 1 Q. B. 173.

The plaintiffs leased a coal-mine to the defendants at a minimum rent, to be increased in case there should be pits sunk on the estate, and the lessees covenanted to work the mine uninterruptedly, efficiently and regularly, according to the usual or most improved practice. *Held*, that the lessees, who worked the mine by out-stroke, were not bound to sink pits, though that might be the most efficient way of working: *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538.

Agreement to employ A. as sole agent, at a particular place, of a colliery for seven years, and agreement by A. to act in the colliery business for no other principal at that place. *Held*, that there was no implied covenant by the employer that the business should be carried on during the seven years: *Rhodes* v. *Forwood* (1876), 1 Ap. Ca. 256.

Assignment of patent, covenant by assignees to pay royalties for articles sold under patent "while subsisting." *Held*, that a covenant to keep the patent on foot could not be implied: *Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597.

Agreement by defendants to sell to plaintiffs, and agreement by plaintiffs to take, all the grains made by the defendants for ten years. *Held*, that a covenant by defendants not by voluntary act to prevent themselves from continuing to supply grains, could not be implied: *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488.

Assignment implying covenant.

To this class of case may be referred the cases in which it has been held that an assignment contains an implied covenant by the assignor not to do anything to prevent the assignee from having the full benefit of the assignment, or in other words, not to derogate from his grant.

A. "sells, assigns, and transfers" to B. a debt due to A. from C. *Held*, that these words amounted to a covenant by A. not to prevent B. from receiving the debt: *Deering* v. *Farrington* (1675), 1 Mod. 113; 3 Keb. 304; Freem. K. B. 368.

Assignment of an apprentice is a good covenant by the first master with the second, that he shall serve his time with him, though it is not an assignment by way of interest: *Caister* v. *Eccles* (1702), 1 Ld. Raym. 683.

Assignment of all the assignor's interest in a patent medicine.

Held, to imply a covenant that he would not sell, or engage with others in selling, the same: *Seddon* v. *Senate* (1810), 13 East, 63.

A. and B. as co-partners assigned to C. the stock-in-trade of, and the debts due to, the partnership; at the date of the assignment a bill of exchange belonging to the partnership was payable to the order of A.; afterwards he made default in transferring it to C. and incapacitated himself from doing so. *Held*, that there was an implied covenant by A. not to do anything in derogation of his own grant, and that he had therefore committed a breach of covenant: *Aulton* v. *Atkins* (1856), 18 C. B. 249.

An assignment of debts, with power to sue in name of assignor, implies a covenant not to do anything in derogation of the assignment, which is broken by the assignor ordering a debtor who had been taken into custody to be discharged: *Gerard* v. *Lewis* (1867), L. R. 2 C. P. 305.

Covenants implied in law by words or relationship.

There are, moreover, certain covenants implied in law by the use of certain words, or by the relationship between the parties.

"A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created; as, if a man by deed demise land for years, covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word '*dedi*:'" per Curiam, *Williams* v. *Burrell* (1845), 1 C. B. 402 at p. 429.

"Demise."

"*Dedi*."

The old doctrine as to the covenants arising at law by the use of the words "give" and "grant" will be found discussed at length by Mr. Butler, Co. Litt. 384 a, note (1); but these words, when used in a deed executed after the 1st October, 1845, do not imply any covenant, except so far as they may do so by virtue of some statute: 8 & 9 Vict. (1845) c. 106, s. 4. The exceptions seem to be the words "grant, bargain, and sell," in bargains and sales of hereditaments in Yorkshire registered under 6 Anne (1707), c. 35, ss. 30 and 34, and 8 Geo. II. (1735) c. 6, s. 35, which Acts are repealed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); amended by 48 Vict. (1884) c. 4; the word "grant" in a conveyance by the promoters of an undertaking under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 132, which operates as express covenants for

"Give."

"Grant."

title, unless limited by express covenant; and a conveyance by a joint-stock company under 19 & 20 Vict. (1856) c. 47, s. 46, which is to imply the ordinary covenants for title, unless the implication be expressly negatived. The covenants "deemed to be included" in certain deeds under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7, do not arise by virtue of the word "give" or "grant."

Relationship of landlord and tenant implies covenant for quiet enjoyment,

The mere relationship of landlord and tenant implies a covenant for quiet enjoyment: Shep. Touch. 165, 167; *Spencer's Case* (1583), 5 Rep. 16 a; *Nokes's Case* (1598), 4 Rep. 80 b; *Style* v. *Hearing* (1606), Cro. Jac. 73; *Iggulden* v. *May* (1804), 9 Ves. 325 at p. 330; *Line* v. *Stephenson* (1838), 5 Bing. N. C. 183; *Hart* v. *Windsor* (1843), 12 M. & W. 68 at p. 85; *Bandy* v. *Cartwright* (1853), 8 Exch. 913; *Hall* v. *City of London Brewery* (1862), 2 B. & S. 737; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145 at p. 152; *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88 at p. 96; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 1 Q. B. 820 at p. 825; *Budd-Scott* v. *Daniel*, [1902] 2 K. B. 351; *Jones* v. *Larington*, [1903] 1 K. B. 253. Probably the reason of this is that originally the Courts would not recognise the tenant as having any estate in the lands demised and would not reinstate him if ejected, and they consequently gave him a remedy in covenant, as otherwise he would have been without remedy if ejected. But such covenant is for such part only of the term as shall elapse while the lessor's interest continues: *Cheiny and Langley's Case* (1589), 1 Leon. 179; *Swan* v. *Stransham and Searles* (1567), Dyer, 257 a; Moore 74; And. 12; Benl. & Dal. 150; *Adams* v. *Gibney* (1830), 6 Bing. 656; *Penfold* v. *Abbott* (1862), 32 L. J. Q. B. 67; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610; and does not cover lawful interruptions by a person claiming under title paramount: *Jones* v. *Lavington*, [1903] 1 K. B. 255.

but only for lessor's term.

"Demise."

The word "demise" implies further a covenant for title: *Holder* v. *Taylor* (1614), Hob. 12; *Fraser* v. *Skey* (1773), 2 Chit. 646; *Burnett* v. *Lynch* (1826), 5 B. & C. 589 at p. 609; *Line* v. *Stephenson* (1838), 4 Bing. N. C. 678; 5 Bing. N. C. 183; and probably "let," or any equivalent word, has the same effect: *Hart* v. *Windsor* (1843), 12 M. & W. 68 at p. 85: *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145 at p. 152; but all these cases were discussed in *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, by Kay, L.J., who appears to doubt whether any such covenant is implied.

"Let."

The covenant implied is only a covenant by the actual lessor: *Smith* v. *Pocklington* (1831), 1 Cr. & Jer. 445, where it was held,

that on a demise by A., the legal owner, A. and B., an equitable owner, could not be sued in covenant.

Express covenant excludes implication.

Where a deed contains an express covenant, no implication of any other covenant on the same subject-matter can be raised.

Covenant implied by "demise" negatived by express covenant.

The implication of a covenant for quiet enjoyment from the word "demise" is rebutted by an express covenant for quiet enjoyment, even if it be restricted: *Nokes's Case* (1598), 4 Rep. 80, see this case discussed: *Procter* v. *Johnson* (1610), 1 Buls. 2; 2 Brownl. & G. 212; Cro. Eliz. 809; Cro. Jac. 233; Yelv. 175; *Holder* v. *Taylor* (1614), Hob. 12; *Merrill* v. *Frame* (1812), 4 Taunt. 329; *Stannard* v. *Forbes* (1837), 6 Ad. & El. 572; *Line* v. *Stephenson* (1838), 4 Bing. N. C. 678; 5 Bing. N. C. 183; 6 Sco. 447; 7 Sco. 69.

So of "grant."

The implication of a covenant from the word "grant" was rebutted by an express covenant in *Clarke* v. *Samson* (1748), 1 Ves. Sen. 100.

Contract to repair.

No implied contract to repair arises out of the relation of landlord and tenant, where the tenant holds under an express contract which provides for the very matter: per Lord Denman, C.J., *Standen* v. *Chrismas* (1847), 10 Q. B. 135 at p. 141.

Agreement under seal for deed to contain a covenant is a covenant.

An agreement under seal to execute a deed which ought to contain certain covenants, operates as a deed containing such covenants.

A., being indebted to B., on simple contract, executed a deed whereby he charged certain property with the payment of the debt, and agreed to execute such a mortgage of the property, with "all powers, covenants, and clauses incidental thereto," as B. should require. *Held*, that the debt was converted into a specialty, on the ground that the mortgage would contain a covenant for the payment of the debt: *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573.

Agreement by deed to execute a lease which should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants, and the lessee covenanted to accept the lease and execute a counterpart. *Held*, in an action by the lessor, that sums due for arrears of rent and dilapidations were specialty debts: *Kidd* v. *Boone* (1871), L. R. 12 Eq. 89.

"Ambiguous words in a covenant are to be taken most strongly against the covenantor": per Bayley, J., *Fowle* v. *Welsh* (1822), 1 B. & C. 29 at p. 35.

Ambiguous words taken against covenantor.

To the same effect are *dicta:* per Willes, J., *Rubery* v. *Jervoise* (1786), 1 T. R. 229 at p. 234; per Lord Kenyon, C., *Barrett* v. *Bedford* (1800), 8 T. R. 602 at p. 605; per Le Blanc and Bayley, JJ., *Love* v. *Pares* (1810), 13 East, 80 at pp. 85, 86; and *Barton* v. *Fitzgerald* (1812), 15 East, 530 at p. 546; per Bayley, J., *Shrewsbury* v. *Gould* (1819), 2 B. & Ald. 487 at p. 494; per Holroyd, J., *Webb* v. *Plummer* (1819), 2 B. & Ald. 746 at p. 751; and per Romilly, M.R., *Warde* v. *Warde* (1852), 16 Beav. 103 at p. 105.

But this rule "must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument:" per Lord Eldon, C.J., *Browning* v. *Wright* (1799), 2 Bos. & P. 13 at p. 22; per Lord Ellenborough, C.J., *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9 at p. 12.

An exception to an absolute covenant is construed strictly.

Exception to covenant.

Where a tenant in tail, with reversion in the Queen, covenanted against the acts of persons except the Queen, her heirs or successors, *existentibus regibus vel reginis Angliae*, an eviction by a patentee of the Queen was held to be a breach of the covenant: *Woodroff* v. *Greenwood* (1596), Cro. Eliz. 518.

A covenant cannot be construed by the interpretation put upon it by the parties: *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295; *Eaton* v. *Lyon* (1798), 3 Ves. 690; *Moore* v. *Foley* (1801), 6 Ves. 232; *Iggulden* v. *May* (1807), 9 Ves. 325; 7 East, 237; 2 Bos. & P. N. R. 449, unless it is contained in an ancient document, as to which see *supra* Chapter on Ancient Documents.

Covenant not construed by conduct of parties.

If there is a personal covenant, followed by a proviso that the covenantor is not to be liable under the covenant, the proviso is repugnant and void: Co. Litt. 146 a; *Furnivall* v. *Coombes* (1843), 5 Man. & Gr. 736; 6 Scott, N. R. 522; but where the proviso limits the personal liability under the covenant, without destroying it, the proviso is valid: *Williams* v. *Hathaway* (1877), 6 Ch. D. 544.

Proviso negativing liability under covenant is void but limiting it is good.

And "no evidence could exclude personal liability in the defendants, if the written document itself makes them liable:"

per Byles, J., *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174 at p. 182.

Where there are two remedies.

If there are two remedies for breach of the covenant—as, for instance, injunction and damages—a proviso that only one remedy shall be pursued would probably be good. "When in a generall grant the law doth give two remedies the grantor may provide that the grantee shall not use one of them and leave the party to the other. But where the grantee hath but one remedy then that remedy cannot be barred by any proviso, for such a proviso should be repugnant to the grant:" Co. Litt. 146 a. There seems to be no reason why this principle should not apply to covenants.

Illegal covenants are void; if illegal in part are only void in part, if severable.

If a covenant is illegal, either by statute or common law, it is void; but if illegal in part only, it is only void *quâ* the part that is illegal, if it can be severed.

"The general rule is that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by common law, you may reject the bad part and retain the good:" per Willes, J., *Pickering* v. *Ilfracombe Railway Co.* (1868), L. R. 3 C. P. 235 at p. 250, cited with approval by Fry, L.J., reading the judgment of the Court (Lord Esher, M.R., Fry and Lopes, L.JJ.), in *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310 at p. 314, by Chitty, J., *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520 at p. 522; and by Bigham, J., *Royal Exchange Assurance Corporation* v. *Sjorforsakrings Aktiebolaget Vega*, [1901] 2 K. B. 567 at p. 573. Some examples of this rule are given *infra* in the Chapter on Covenants in restraint of trade.

Covenant with penalty.

In many cases provisions for the payment of a penalty or of a sum for liquidated damages if an act be omitted or done are annexed to a covenant to do or not to do such act: in such cases the question arises whether the covenant to do or not to do the particular act is to be construed as a covenant to do or not to do that act, or only as a covenant that, if the act be omitted or be done as the case may be, the penalty or liquidated damages shall be paid; in other words, whether specific performance or an injunction to enforce or prevent the doing of the act can be obtained, or only the penalty or liquidated damages can be recovered if it be omitted or done. "The question always is, What is the contract?—is it that one certain act shall be done, with a sum annexed whether by way of penalty or damages to secure the performance of this very act? or is it that one of two things shall be done at the

election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money?" Fry on Specific Performance (4th ed.), p. 58. The rule applicable to the question may be stated thus:—

> If there be a covenant with a penalty or liquidated damages to be paid on breach of the covenant, the covenant is not to be broken; but if there be a covenant, with a provision that it is not to be broken unless on payment of a penalty or damages, the covenant may be broken on payment of the penalty or damages.

When a covenant the observance of which is secured by a penalty must be performed specifically.

"There are three classes of covenants: first, covenants not to do particular acts, with a penalty for doing them, which are within the statute 8 & 9 Will. III. (1696) c. 11 (which provides that damages for breach must be determined by a jury); secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute; and thirdly, covenants that an act shall not be done unless subject to a certain payment:" per Bramwell, B., *Legh* v. *Lillie* (1860), 6 H. & N. 165 at p. 171.

"The declaration sets out a covenant by the defendant that he will not sell or carry away from the demised premises any manure, &c., without the consent in writing of the plaintiff, under the increased rent of 10*l.* for every ton so carried away. Now there are various forms in which a covenant of this sort may be expressed; a man may covenant simply that he will not do such an act, or that if he does he shall pay a penalty, or that if he does any such act he shall pay liquidated damages. Had the covenant been in either of these forms, it would have been substantially a covenant not to do the act, with a subsequent covenant that if he did it he should pay a penalty or liquidated damages. But the covenant in this case is not in either of these forms. It is a single covenant, not two covenants, that the covenantor will not remove manure, under an increased rent of 10*l.* for every ton carried away. The word 'rent' points not only to the injury to the covenantee, but to the benefit the covenantor may derive from doing the act which is prohibited. It is on that ground, amongst other reasons, that I think that the meaning is that the covenantor may remove manure if he chooses to pay the increased rent:" per Wilde, B., *Legh* v. *Lillie* (1860), 6 H. & N. 165 at p. 173.

"The terms of the lease are, that the party will not do the act under a penalty; therefore it is a covenant against doing the act,

and a stipulation that, if he shall do it, he is to pay a particular sum per acre. The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for 600*l.*, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract. This I apprehend is the general rule of equity. It is so laid down by Lord Hardwicke in *Howard* v. *Hopkyns* (1742), 2 Atk. 371, and by Lord Thurlow in *Sloman* v. *Walter* (1784), 1 Bro. C. C. 418; as far as relates to settlements, the rule was established by *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528, which was followed in the very imperfectly reported case of *Logan* v. *Wienholt* (1833), 1 Cl. & Fin. 611, and also in *Roper* v. *Bartholomew* (1823), 12 Pri. 797, and again in *Hardy* v. *Martin* (1783), 1 Cox, 26. Now from all these cases it appears that the question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it a payment is reserved, or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act on payment of what is agreed upon as an equivalent:" per Sugden, C., *French* v. *Macale* (1842), 2 Dr. & War. 269 at p. 274.

Examples. Specific performance decreed.

In the following cases it was held that the covenant was to be performed specifically.

Covenants in restraint of trade: *Hardy* v. *Martin* (1783), 1 Cox, 26; *Barret* v. *Blagrave* (1800), 5 Ves. 555; *Clarkson* v. *Edge* (1863), 33 Beav. 227; *Fox* v. *Scard* (1863), 33 Beav. 327; *Bird* v. *Lake* (1863), 1 H. & M. 111; *Howard* v. *Woodward* (1864), 34 L. J. Ch. 47; *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518; *Jones* v. *Heavens* (1877), 4 Ch. D. 636; *Weston* v. *Managers of Metropolitan District Asylum* (1882), 8 Q. B. D. 387; 9 Q. B. D. 404; *London and Yorkshire Bank* v. *Pritt* (1887), 56 L. J. Ch. 987; as to building, *Coles* v. *Sims* (1854), 5 De G. M. & G. 1 (on app. from Kay, 56, where the case is incorrectly stated); to grant a lease, *Butler* v. *Powis* (1845), 2 Coll. 156; to settle land, *Nandike* v. *Wilkes* (1716), Gilb. Eq. Rep. 114; *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528; *Prebble* v.

Boghurst (1818), 1 Swanst. 309; *Roper* v. *Bartholomew* (1823), 12 Pri. 797; to leave property by will, *Logan* v. *Wienholt* (1833), 1 Cl. & Fin. 611; 7 Bl. N. S. 1; to pay an annuity of variable amount as part of a family arrangement, *Jeudwine* v. *Agate* (1829), 3 Sim. 129; not to "burn" the demised premises, *French* v. *Macale* (1842), 2 Dr. & War. 269; 1 Con. & L. 459.

Specific performance refused.

In the following cases specific performance of a covenant, the performance of which was secured by a named sum, was not enforced.

Covenant in restraint of trade, *Sainter* v. *Ferguson* (1849), 1 Mac. & Gor. 286; *Young* v. *Chalkley* (1867), 16 L. T. 286; to renew a lease, *Magrane* v. *Archbold* (1813), 1 Dow. 107; not to plough pasture land, *Woodward* v. *Gyles* (1690), 2 Vern. 119; *Rolfe* v. *Peterson* (1772), 2 Br. P. C. 436.

Penalty or damages.

If specific performance of the covenant cannot be obtained, a further question arises whether the sum to be paid for breach of the covenant is a penalty or is liquidated damages.

Difference as to amount recoverable.

Where the covenantee sues for compensation for breach of such a covenant, (i.) if the sum named is held to be a penalty he will recover such damages, be they more or less than the amount of the penalty, as he has actually sustained, 8 & 9 Will. III. (1696) c. 11, s. 8; but (ii.) if the sum named is held to be liquidated damages, he will recover that sum without reference to the damages actually sustained, as in this case the parties have themselves assessed the damages: see *Gainsford* v. *Griffith* (1668), 1 Wms. Saund. 51 (ed. 1871, vol. 1, p. 67).

No general rule can be laid down as to whether the sum named is a penalty or liquidated damages; it can only be stated that—

Penalty or damages, question of construction.

> The question whether a sum named to be paid on non-performance of a covenant is a penalty, or liquidated damages, depends on the construction of the whole deed.

Words are not conclusive.

The use of the words "liquidated damages" or "penalty" in describing the nature of the payment, is not conclusive: *Kemble* v. *Farren* (1829), 6 Bing. 141; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; *Dimech* v. *Corlett* (1858), 12 Moore, P. C. C. 199; *Betts* v. *Burch* (1859), 4 H. & N. 506; and per Fry, J., *Wallis* v. *Smith* (1882), 21 Ch. D. 243 at p. 249; and in the following cases the sum was called both: "a penalty to be recovered as liquidated damages," *Davies* v. *Penton* (1827), 6 B. & C. 216; *Boys* v. *Ancell* (1839), 5 Bing. N. C. 390 (a case on an instrument not under seal); "penalty" and "liquidated damages" in the same sentence, *Legg* v. *Harlock* (1848), 12 Q. B. 1015.

It may, however, be laid down as a rule that—

If sum conditioned on one event it is damages; if on more than one, it is penalty.

> "It is the law that where payment is conditioned on one event, the payment is in the nature of liquidated damages, but where it is conditioned on more than one event, it is in the nature of a penalty:" per A. L. Smith, L.J., *Strickland* v. *Williams*, [1899] 1 Q. B. 382 at p. 384.

"When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification. . . . Where the payments are made proportionate to the extent to which the" covenantors "may fail to implement their obligations and they are to bear interest from the date of the failure," they ought not "to be regarded as penalties:" per Lord Watson, *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 Ap. Ca. 332 at p. 342.

Sir George Jessel, M.R., was inclined to confine this rule to cases where one of the acts to be done was the payment of a sum of money, less than the stipulated penalty: see his judgment in *Wallis* v. *Smith* (1882), 21 Ch. D. 243 at p. 256; but, notwithstanding his judgment in that case, the rule is not so confined: see per Lord Esher, M.R., *Willson* v. *Love*, [1896] 1 Q. B. 626 at p. 630.

Examples. Where sum held to be damages;

In the following cases the stated sum was held to be liquidated damages: *Lowe* v. *Peers* (1768), 4 Burr. 2225; *Rolfe* v. *Peterson* (1772), 2 Br. P. C. 436; *Fletcher* v. *Dyche* (1787), 2 T. R. 32; *Reilly* v. *Jones* (1823), 1 Bing. 302; 8 Moore, 244; *Leighton* v. *Wales* (1838), 3 M. & W. 545; *Green* v. *Price* (1845), 13 M. & W. 695; S. C. *sub nom. Price* v. *Green* (1847), 16 M. & W. 346; *Galsworthy* v. *Strutt* (1848), 1 Exch. 659; *Sainter* v. *Ferguson* (1849), 7 C. B. 716; *Atkyns* v. *Kinnier* (1850), 4 Exch. 776; *Reynolds* v. *Bridge* (1856), 6 El. & Bl. 528; *Mercer* v. *Irving* (1858), El. Bl. & El. 563; *Sparrow* v. *Paris* (1862), 7 H. & N. 594; *Crux* v. *Aldred* (1866), 14 W. R. 656; *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161; *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70; *Wallis* v. *Smith* (1882), 21 Ch. D. 243; *Mexborough* v. *Wood* (1882), 47 L. T. 516; *Catton* v. *Bennett* (1884), 51 L. T. 70; *Strickland* v. *Williams*, [1899] 1 Q. B. 382.

and held to be penalty.

In the following cases the stated sum was held to be a penalty: *Hardy* v. *Martin* (1783), 1 Br. C. C. 419 (note); 1 Cox, 26; see the comments of Lord Eldon, C.J., 2 Bos. & P. at p. 352; *Sloman* v.

Walter (1784), 1 Br. C. C. 418; *Astley* v. *Weldon* (1801), 2 Bos. & P. 346; *Smith* v. *Dickenson* (1804), 3 Bos. & P. 630; *Harrison* v. *Wright* (1811), 13 East, 343; *Davies* v. *Penton* (1827), 6 B. & C. 216; *Kemble* v. *Farren* (1829), 6 Bing. 141; *Charrington* v. *Laing* (1829), 6 Bing. 242; *Boys* v. *Ancell* (1839), 7 Scott, 364; 5 Bing. N. C. 390; *Horner* v. *Flintoff* (1842), 9 M. & W. 678; *Reindel* v. *Schell* (1858), 4 C. B. N. S. 97; *Betts* v. *Burch* (1859), 4 H. & N. 506; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; *Re Newman* (1876), 4 Ch. D. 725; *Browne* v. *Phillips* (1882), 10 L. R. Ir. 212; *Dickson* v. *Lough* (1886), 18 L. R. Ir. 518.

Recovery of penalty is satisfaction of covenant.

If the penalty is recovered as liquidated damages, the recovery of the penalty is a satisfaction of the whole covenant.

"There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election; he may either bring an action of debt for the penalty and recover the penalty (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); or if he does not choose to go upon the penalty he may proceed upon the covenant and recover more or less than the penalty *toties quoties*:" per Lord Mansfield, C.J., *Lowe* v. *Peers* (1768), 4 Burr. 2225 at p. 2228.

Covenant not to practise as a surgeon under a penalty of 500*l.* The plaintiff recovered the 500*l.*, and was held not entitled to an injunction: *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 286; *Carnes* v. *Nesbitt* (1862), 7 H. & N. 778; *Howard* v. *Woodward* (1864), 34 L. J. Ch. 47; *Young* v. *Chalkley* (1867), 16 L. T. 286; *General Accident Assurance Corporation* v. *Noel*, [1902] 1 K. B. 377.

Under bond no more than penalty recoverable.

"Of course it makes no real difference whether the case is one of a bond or a covenant. You can recover under the bond only the actual damages sustained; though if the amount of damages exceeds the amount of the penalty, you can recover no more than the penalty": per Jessel, M.R., *Palmer* v. *Locke* (1880), 15 Ch. D. 294 at p. 297.

Covenant operating as assignment of present property.

A covenant that property shall as from the date of the deed belong to another operates in equity as a conveyance.

Thus a covenant "that my horse is yours:" Shep. Touch. 162; Plowd. 308 *Arg.*; a covenant to stand seised, before the Statute of

Uses; a covenant that you "shall have my land for five years:' Shep. Touch. 161; are equitable conveyances.

"A contract for valuable consideration by which it is agreed to make a present transfer of property passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance:" per Lord Westbury, C., *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191 at p. 209; but *quaere* whether the proviso is strictly accurate. "The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created:" per Lord Macnaghten, *Tailby* v. *Official Receiver* (1888), 13 Ap. Ca. 523 at p. 548.

But a mere charge in favour of a volunteer on a reversionary interest in stock standing in the name of a trustee (not specifically mentioned) does not create a perfect and complete equitable charge, but depends only on contract: *Re Lucan, Hardinge* v. *Cobden* (1890), 45 Ch. D. 470.

Assignment of future property operating as covenant.

On the other hand, an attempted assignment of property of which the assignor is not the present owner cannot take effect by way of present conveyance, but operates as a contract to convey the property when the assignor shall have become owner of it, and when that happens as an equitable assignment.

Charge of an annuity on a benefice and covenant that if covenantor should be preferred to another benefice, he would charge it with the annuity, and that in the meantime it should stand charged therewith. The charge was at the date of the deed legal. The covenantor was preferred to another benefice, and after such preferment, but before any legal charge was created thereon, charges on benefices were prohibited. *Held*, by Lord Cottenham, C., that there was an equitable charge independently of the covenant to execute a legal charge: *Metcalfe* v. *Archbishop of York* (1836), 1 My. & Cr. 547.

In *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, where there was an assignment by way of security to a creditor of chattels which might be afterwards brought on to the premises, Jessel, M.R., said (at p. 351): "That assignment constituted only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, *e.g.*, in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purport actually to

convey by the deed all such real estate, the effect is the same. It is a contract for value, which will bind the property, if the father leaves any property to the son."

Future property must be defined.

The property, however, must be defined. The following properties have been held to be sufficiently defined: all machinery which shall be placed in the mill, in addition to or substitution for the original machinery: *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191; stock-in-trade which shall be brought into the premises in addition to or substitution for the present stock-in-trade: *Lazarus* v. *Andrade* (1880), 5 C. P. D. 318; crops which at any time should be in or about the same or any other premises: *Clements* v. *Matthews* (1883), 11 Q. B. D. 808; all moneys to which he then was, or might become, entitled under any will: *Re Clarke, Combe* v. *Carter* (1887), 36 Ch. D. 348; all book debts which might become due and owing: *Tailby* v. *Official Receiver* (1888), 13 Ap. Ca. 523; any property to which he should become entitled by purchase: *Re Turcan* (1888), 40 Ch. D. 5; "all real and personal property (except business assets) to which A. and B. or either of them is now or shall become entitled in reversion or otherwise:" *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769; overruling *Ex parte Bolland* (1873), L. R. 17 Eq. 115; and where a covenant includes future property of all descriptions, the covenant, if it is too wide (as to which there has been no decision, but see per Lord Macnaghten in *Tailby* v. *Official Receiver* (1888), 13 Ap. Ca. 523 at p. 544; and *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769), can be severed: *Clements* v. *Matthews* (1883), 11 Q. B. D. 808; *Re Clarke, Combe* v. *Carter* (1887), 36 Ch. D. 348.

Whether an assignment of all future property is valid.

If assignee gets possession of future property he gets legal title.

An assignment of after-acquired property, of which the assignee obtains possession when it comes into existence, operates as an assignment at law, and not merely in equity.

"At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed is altogether void. But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor or is allowed by him to be taken by the assignee; in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass:" per Lord Chelmsford, *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191 at p. 216.

By a building agreement it was agreed that all building and other materials brought by the builder upon the land should, whether affixed to the property or not, become the property of the landlord.

Held, that bricks brought on to the land belonged to the landlord. "Down to the time when the building materials were brought upon the landlord's premises there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity in any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed at law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that upon the happening of a particular event the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before:" per Bowen, L.J., *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436 at p. 441; *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713; *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690; but where a similar contract provided that "all plant, &c., brought on the ground by the contractor . . . shall be considered to be the property of the landlord." *Held*, that the property remained in the contractor: *Re Keen and Keen, Ex parte Collins*, [1902] 1 K. B. 555.

By an agreement in writing a manufacturer agreed that certain advances made by his agent should be "covered and secured by the stock of goods which shall be in his hands." *Held*, by Stirling, J., that when the goods had come into the hands of the agent there was an agreement coupled with possession which created a legal and not an equitable right to the goods: *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352.

Covenant operating a release.

A covenant not to sue on an obligation may operate as a release or defeasance of the obligation.

But such a covenant must be for ever and must extend to all the obligors, if more than one, otherwise it only gives a right of action on the covenant: Shep. Touch. 163; *Ayliff* v. *Scrimshire* (1688), Holt, 619; *sub nom. Ailoffe* v. *Scrimshire*, Carth. 63; *Lacy* v. *Kinnaston* (1700), Holt, 178; 1 Ld. Raym. 688; *Gibbons* v. *Vouillon* (1849), 4 C. B. 483; *Wilson* v. *Braddyll* (1854), 9 Exch. 718.

A covenant to observe covenants and to indemnify the covenantee in respect thereof is one of indemnity only.

Covenant to observe covenants and indemnify is covenant for indemnity only.

A covenant contained in a conveyance, or assignment of a lease, to observe restrictive covenants contained in a prior conveyance of the land, or the covenants on the lessee's part contained in the lease, and to indemnify the grantor, or assignor, against such covenants is merely for the purpose of indemnifying the grantor or assignor, and does not enable him to sue the grantee or lessee unless he is required to keep such covenants by his grantor or the lessor: *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173; *Harris* v. *Boots Cash Chemists, Ltd.*, [1904] 2 Ch. 376.

Inasmuch as the covenantee must sue and the covenantor be sued—

No person can sue on a covenant made by himself, either alone or jointly with others, with himself, either alone or jointly with others.

Covenant with oneself is nugatory.

Mainwaring v. *Newman* (1800), 2 Bos. & P. 120. "There is no principle by which a man can be at the same time plaintiff and defendant:" per Best, C.J., *Neale* v. *Turton* (1827), 4 Bing. 149 at p. 151; *Faulkner* v. *Lowe* (1848), 2 Exch. 595; *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836; but it is said that after the death of him, who is both covenantor and covenantee, the covenant can be sued on by or against the survivors: *Rose* v. *Poulton* (1831), 2 B. & Ad. 822.

The distinction between a covenant with a person not a party to the deed, contained in a deed *inter partes*, and a covenant contained in a deed not *inter partes*, and the cases on such distinction, and the statutory limitation thereof, have been already referred to *supra*, Chapter on the Form and Execution of Deeds (see pp. 23, 24).

Covenant with person not a party to deed.

A covenant not to revoke a will is not void as being in restraint of marriage: *Robinson* v. *Ommaney* (1883), 23 Ch. D. 285.

Covenant not to revoke will.

Two ante-nuptial settlements having been executed each containing a covenant for settlement of the wife's after-acquired property, but upon dissimilar trusts, it was held, in the absence of evidence of reasons for making the second settlement, and without deciding whether the first settlement could have been superseded by the second, that it was not in fact superseded: *Re Gundry, Mills* v. *Mills*, [1898] 2 Ch. 504.

Two covenants to settle, first taken.

CHAPTER XXIX.

COVENANTS WHETHER JOINT OR SEVERAL.

Liability, under Covenant, whether Joint or Several—Covenants by Partners—Liability under Covenants implied in Law—Benefit of Covenant, whether Joint or Several—Where one of Several Covenantees has no Beneficial Interest.

The liability on covenants may be joint or several or both, and the benefit of covenants may enure jointly or severally.

If there are two or more covenantors, they may bind themselves jointly, or severally, or both jointly and severally; in other words, the liability on the covenant may be either joint, or several, or both joint and several. And if there are two or more covenantees, the covenant may be entered into with them jointly, or severally, or both jointly and severally; but in this case, however the covenant may be framed, it cannot enure to the benefit of the covenantees both jointly and severally.

If words are clear liability is determined by words; if ambiguous, by interest of the covenantors.

> Where the words of a covenant by several are clear and unambiguous, the question whether the liability on the covenant is joint, several, or joint and several, is to be determined solely by the words; but where the words are ambiguous, the liability will depend on the interests of the covenantors and other circumstances.

"I take it to be clear that where several persons covenant with another in terms which import without ambiguity a joint and not a several obligation, the covenant must be held to be a joint one. Where the terms are ambiguous and may import either a joint or a several obligation, you may no doubt look at the other parts of the deed, the interests of the covenantors and indeed any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties:" per Lord Herschell, *White* v. *Tyndall* (1888), 13 Ap. Ca. 263 at p. 276.

Liability joint, under express words.

In the following cases the express words were held to create a joint liability.

Joint covenant given by continuing partners to a retiring partner, for indemnity: *Sumner* v. *Powell* (1816), 2 Mer. 30; on app., 1 Turn. & Russ. 423; or to pay specified sums to him: *Wilmer* v. *Curry* (1848), 2 De G. & Sm. 347; lease to C., containing covenants by C. and D. to repair, &c., *Copland* v. *Laporte* (1835), 3 A. & E. 517; lease to partners of a house in which they carried on their business, containing joint covenants by them: *Clarke* v. *Bickers* (1845), 14 Sim. 639; lease to "G. and A., their executors, &c.," *habendum* "to G. and A., their executors, &c., as tenants in common and not as joint tenants" at a rent, covenants by G. and A. "for themselves, their executors, &c., that they the said G. and A. or some or one of them their executors, &c." *Held*, to be joint covenants only, and that the executors of G., who predeceased A., were not liable thereon: *White* v. *Tyndall* (1888), 13 Ap. Ca. 263.

Liability several, under express words.

In the following cases the express words were held to create a several liability.

"*Conveniunt separatim:*" *Mathewson's Case* (1596), 5 Rep. 22 b. Where several covenantors covenant, each as to his own acts and defaults only, the effect is the same as if each had executed a separate deed on the same parchment: *Mathewson's Case* (1596), 5 Rep. 23 a; S. C. *sub nom. Mathewson* v. *Lydiate*, Cro. Eliz. 408, 470, 546.

Bond whereby three acknowledged themselves bound "in 1,000*l.* each, for which we bind ourselves and each of us for himself for the whole and entire sum of 1,000*l.* each." *Held*, a several bond only: *Collins* v. *Prosser* (1823), 1 B. & C. 682.

A., as principal, and B., C., and D., as sureties, executed a bond in the form: "We, A., B., C., and D., are held and firmly bound to E. in the sum of 50*l.* *each*, to be paid to E., his executors, &c.; to which payment we hereby bind us and each of us, our and each of our heirs, executors, and administrators, and every of them." *Held*, that the bond was the separate bond of each obligor, binding each to pay the sum of 50*l.*; and therefore the payment of 50*l.* by B. was no answer to an action on the bond against C.: *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440.

Liability joint and several under express words.

In the following cases the express words were held to create a joint and several liability.

"*Nos vel quemlibet nostrum:*" *Hankinson* v. *Sandilands* (1614), 1 Brownl. & G. 121. "*Se et quemlibet eorum:*" *Bolton* v. *Lee* (1673), 2 Lev. 56; 3 Keb. 39, 50. "For themselves and every of them:" *May* v. *Woodward* (1677), Freem. K. B. 248. "*Pro se et quolibet eorum:*" *Robinson* v. *Walker* (1702), 1 Salk. 393; 7 Mod.

154. "For themselves and either of them:" *Enys* v. *Donnithorpe* (1760), 2 Burr. 1190.

A deed of assignment by a bankrupt contained a joint covenant by the assignees to account for "such money as they or either of them" should receive. *Held*, that they were jointly and severally bound: *Primrose* v. *Bromley* (1739), 1 Atk. 89.

Joint and several bond, the condition being for payment of an annuity by the obligees in moieties during their lives, and after the death of one by the survivor, the survivor made default. *Held*, that the estate of the other was liable: *Church* v. *King* (1836), 2 My. & Cr. 220.

Bond by three binding themselves jointly and their respective heirs. *Held*, joint and several: *Tippins* v. *Coates* (1853), 18 Beav. 401.

A letter of guarantee, signed in the firm name and in that of each partner, "We hereby guarantee the payment, &c." *Held*, to create a joint and several liability: *Ex parte Harding* (1879), 12 Ch. D. 557.

Agreement under seal that J. and L. should assign certain letters patent (which had been granted to J. and L., their executors, &c., "to the end that they, their executors, &c., and every of them" should have the benefit thereof), such assignment to contain a covenant by the vendors that the letters patent were valid. *Held*, that the obligation was that J. and L. had jointly covenanted to assign with joint and several covenants by them that the letters patent were valid: *National Society for the Distribution of Electricity by Secondary Generators* v. *Gibb*, [1900] 2 Ch. 280.

Covenants by partners.

In *Beresford* v. *Browning* (1875), 20 Eq. 564; on app., 1 Ch. D. 30, a covenant, in terms creating only a joint liability, to pay out a deceased partner's share in a business was held to be merely an arrangement as to the mode of discharging a pre-existing joint and several liability, which accordingly did not alter the nature of the liability. In the judgment of Jessel, M.R., in that case are many remarks as to partnership liabilities, which must now be considered with reference to the judgments of Lord Cairns, C., and Lord Selborne, in *Kendall* v. *Hamilton* (1879), 4 Ap. Ca. 504.

Lord Cairns on partnership debts.

"There is no doubt that in many cases and text books we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a

deceased member of the partnership. Where a member of the partnership died, the debts became, in the eye of a Court of Law, the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners, to come for payment against the assets of the deceased partner, and from this again the transition was easy to the expression which said that partnership debts, in the eye of a Court of Equity, were joint and several, not thereby meaning that a Court of Equity altered or changed a legal contract, but merely that the Court in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity, which the surviving partners might have insisted on:" per Lord Cairns, L.C., *Kendall* v. *Hamilton* (1879), 4 Ap. Ca. 504 at p. 516; and see the speech of Lord Selborne in the same case at p. 537.

Liability on covenants implied in law.

If a demise be made by more than one person, the covenant implied by the word "demise," for right to demise is joint, while the covenant implied for quiet enjoyment is several: *Coleman* v. *Sherman* (1689), Comb. 163; 1 Salk. 137; Carth. 97; but both must demise, if one demise and the other confirm, there is no joint covenant: *Smith* v. *Pockington* (1831), 1 C. & J. 445; 1 Tyr. 309.

Demise to two for a term at a rent, with a covenant by them jointly and severally for payment of taxes, &c., but no express covenant for payment of rent. *Held*, that the rent was payable by the two jointly, though one occupied the whole house and had paid the whole rent for five years: *Rex* v. *Great Wakering* (1834), 5 B. & Ad. 971.

If words are clear benefit is determined by words, if ambiguous by

Where the words of a covenant with several are clear and unambiguous, the question whether the benefit of the covenant is to enure to the covenantees jointly, or to

interest of covenantees.

each covenantee separately, is to be determined solely by the words; but where the words are ambiguous, the benefit will enure to them jointly, or to each of them separately, according as their interest in the subject-matter of the covenant is joint or several.

Rule is one of construction not of law.

It was formerly supposed to be a rule of law that the benefit of the covenant must be taken as enuring jointly or severally according as the interest of the covenantees was joint or several: see *Slingsby's Case* (1588), 5 Rep. 18 b; *Eccleston* v. *Clipsham* (1669), 1 Wms. Saund. 153 (ed. 1871, vol. 1, p. 162); but the true doctrine, which was first laid down by Mr. Preston (Shep. Touch. 166), is that the rule is one of construction only.

"I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Preston in the passage in Shep. Touch. (p. 166). Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versâ*. But there is no rule to say that words which are expressly a joint covenant by (*sic*, *sed quaere* with) several persons shall be construed as a several covenant, unless there is something to lead to that construction. Where there are several parties, if the interest is joint, the covenant is construed as a joint covenant. If a party covenants with A. and B. to do something for B., and the words themselves are otherwise free from ambiguity, it must be a joint covenant:" per Abinger, C.B., *Sorsbie* v. *Park* (1843), 12 M. & W. 146 at p. 156; 13 L. J. Ex. 9 at p. 11.

"I think the correct rule is laid down by Gibbs, C.J., in *James* v. *Emery* (1818), 5 Price, 529 at p. 533; 2 J. B. Moo. 195, with the qualification stated by Mr. Preston in the note in Shep. Touch. 166. That rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint:" per Parke, B., *Sorsbie* v. *Park* (1843), 12 M. & W. 146 at p. 158.

In *Keightley* v. *Watson* (1849), 3 Exch. 716; 18 L. J. Ex. 339; Pollock, C.B. (at p. 721), says: "I consider that the inquiry really is as to the true meaning of the covenant, at the same time bearing

in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, though the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, though the interest be joint. It is a question of construction." In the same case, Parke, B. (at p. 722) says: "The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest." And Rolfe, B. (at p. 726), says: "It appears to me that Mr. Preston's suggestion was perfectly well founded, that the rule in *Slingsby's Case* (1588), 5 Rep. 18 b, was not a rule of law, but a mere rule of construction." See similar remarks: per Maule, J., *Beer* v. *Beer* (1852), 12 C. B. 60 at p. 78.

The case of *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, in which it was said that, according to equity, joint creditors must *primâ facie* be taken to be interested as tenants in common, and not as joint tenants, is explained by Farwell, J., in *Powell* v. *Brodhurst*, [1901] 2 Ch. 160 at p. 164, as being a decision on a question whether it was clear that the debt was joint, there being a conflict of presumptions whether there was, or was not, a joint tenancy.

Examples.

In the following cases the covenants were held to enure to the benefit of the covenantees jointly; but some of the earlier cases were decided before the rule that clear words are to have their proper effect was established.

Benefit joint.

Agreement under seal by fiddlers that they would not play asunder, and they were bound in 20*l.* each, *omnibus et cuilibet eorum;* and one only brings an action for breach of the covenant. *Held*, that all ought to have joined, as the interest was joint: *Spencer* v. *Durant* (1689), Comb. 115; 1 Show. 8.

Action of covenant by the herald painters, *et pro quolibet et singulis eorum*, that they should bring their work to a certain place, and that the money paid for such work, when it should be received, should be brought to the aforesaid place and divided between them in certain parts and proportions. Action by all the others against one who did not bring his work to the appointed place. *Held*, that, the interest being joint, the action was well brought by all: *Saunders* v. *Johnson* (1693), Skin. 401.

Covenant with L. and B., their heirs, executors, administrators, and assigns, to pay to L. and B., their executors, &c., one annuity or yearly sum of 30*l.* in the shares and proportions following, viz., the sum of 15*l.*, being one moiety of the annuity to L., his executors, &c., and the sum of 15*l.*, the remaining moiety, unto B., his executors, &c., to be respectively paid quarterly. The powers for securing the annuity were given to L. and B. jointly. There was a joint power to them to enter up a joint judgment, and a joint power to sell certain stock. The annuity was redeemable on payment of a certain sum to L. and B., their executors or administrators. In an action brought by L. alone for his share of the annuity; held, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that L. could not sue alone: *Lane* v. *Drinkwater* (1834), 1 Cr. M. & R. 599; 5 Tyr. 40.

F. and W. demised land to the defendant, who covenanted with F. and W., their heirs, executors, &c., to repair, &c. F. died, and his heir brought an action for breaches of covenant committed since F.'s death. *Held*, that W. ought to have joined in the action: *Foley* v. *Addenbrooke* (1843), 4 Q. B. 197.

Demise by persons who, on the face of the lease, appeared to be tenants in common; covenants by the lessees with the lessors "and each and every of them, their and every of their heirs, executors, administrators, and assigns, to repair, &c." *Held*, that the benefit of the covenants was joint and not several: *Bradburne* v. *Botfield* (1845), 14 M. & W. 559.

Covenant by A. "with B., and also as a distinct covenant with C." to pay interest on money advanced by B. as C.'s trustee. *Held*, that both B. and C. ought to sue for breach of covenant: *Hopkinson* v. *Lee* (1845), 6 Q. B. 964.

Demise by tenants in common, "according to their several estates," the lessees covenanting with them "and their respective heirs and assigns" to repair. *Held*, that the benefit of the covenant was joint and not several: *Thompson* v. *Hakewill* (1865), 19 C. B. N. S. 713.

The same rule was applied to a contract not under seal in *Pugh* v. *Stringfield* (1858), 3 C. B. N. S. 2; 4 C. B. N. S. 364.

Benefit several.

In the following cases the covenants were held to enure to the benefit of the covenantees severally; but some of these cases also were decided before the rule above stated was fully established.

A. and B. covenant with C. to sell land to him. "*Item*, it is agreed between the parties" that C. shall pay to A. so much money. On non-payment of the purchase-money, an action was brought by A. and B. *Held*, that it ought to have been brought by A. only: *Tippet* v. *Hawkey* (1688), 3 Mod. 263.

Covenant with A. and B. to receive the rents due to A. and B. and to pay one moiety to each of them. *Held*, that A. could bring an action for his moiety without B.: *Lilly* v. *Hodges* (1723), 8 Mod. 166.

Agreement under seal by tenants in common to sell land. Covenant by the purchasers with the vendors "and each of them, their and each of their executors, &c.," to pay the purchase-money to the vendors, "their executors, &c., in the proportions" following, that is to say, &c. *Held*, that as the interest of the covenantees was several, the benefit of the covenant was several: *James* v. *Emery* (1818), 8 Taunt. 245; 5 Pri. 529.

By deed reciting the grant of one annuity to A. and of another annuity to B., C. covenanted with A. and B., their executors, &c., to pay the annuities or either of them if the grantor should make default. *Held*, that the covenant being for the payment of a distinct annuity to each of the covenantees, one might sue without the other: *Withers* v. *Bircham* (1824), 3 B. & C. 254; 5 Dowl. & Ry. 106.

Covenant by the master of a vessel with the part owners to pay certain moneys to them "and to their and every of their several and respective heirs, executors, administrators, and assigns," at a certain bank, "and in such shares and proportions as were set against their several and respective names." *Held*, that their interests being separate, they must sue separately: *Servante* v. *James* (1829), 10 B. & C. 410.

By deed, reciting four several contracts for purchase of land from different owners, the defendant covenanted with each of the owners to complete the contract. *Held*, that one of the vendors alone might bring an action on the covenant: *Poole* v. *Hill* (1840), 6 M. & W. 835.

By deed reciting a proposal by the owners of a colliery to divide it into a certain number of shares, and an agreement for sale to the

parties of the third part of so many of the shares respectively as were set opposite their respective names, the owners covenanted with each of the purchasers, their executors, &c., to show a good title. *Held*, that the interest of each covenantee was distinct, and, therefore, that he could bring his action for breach of covenant without the others: *Mills* v. *Ladbroke* (1844), 7 Sco. N. R. 1005; 7 M. & Gr. 218.

By deed reciting that A. had agreed to purchase land from the plaintiff, and to sell it to the defendants at a certain price, and containing covenants to that effect, the defendants covenanted with the plaintiff, and as a separate covenant with A., "to pay to the plaintiff, or to A., in case the plaintiff shall then have been paid his purchase-money," the unpaid part of the purchase-money on a certain day, and to pay interest in the meantime to the plaintiff. *Held*, that the plaintiff might sue without A. in respect of the interest: *Keightley* v. *Watson* (1849), 3 Exch. 716; 18 L. J. N. S. Ex. 339.

Covenant by six directors of a joint stock company, with five others, their executors, &c., that they would indemnify the five others, their executors, &c., their estates and effects from all claims. *Held*, that one of the five who had been made liable in respect of some claims could sue alone, the words of the covenant admitting of being construed as made with the five severally: *Haddon* v. *Ayers* (1858), 1 El. & El. 118.

An assistant, employed by two surgeons, agreed that he would not at any time carry on the profession or business of a surgeon in Newtown, or within ten miles thereof. *Held*, that after the surgeons had dissolved partnership, one of them alone could sue for a breach of the agreement, the assistant having become assistant to the other: *Palmer* v. *Mallett* (1887), 36 Ch. D. 411.

Where a covenant running with the land was entered into with one lessor, who afterwards devised the reversion to six tenants in common, one tenant in common was allowed to maintain an action for damages for breach of covenant without joining the others: *Roberts* v. *Holland*, [1893] 1 Q. B. 665.

Where one covenantee has no interest.

A covenant with two or more, or with two or more and each and every of them, where one of them has no beneficial interest in the subject-matter of the covenant, will be construed as a covenant with them jointly, and the benefit of it will survive.

Examples.

Indenture of covenants between A. and B., of the one part, and C., of the other part; and (*inter alia*) it is agreed between the parties that C. shall enter into a bond to pay a certain sum to A. On an action brought by the administrator of A. for breach of covenant, held, that he could not maintain it, as the benefit of the covenant survived to B.: *Rolls* v. *Yate* (1611), Yelv. 177; S. C. *sub nom. Yate* v. *Roules*, 1 Buls. 25; *sub nom. Yates* v. *Rolles*, 2 Brownl. & G. 207.

Covenant with A. and also with B., to pay an annuity to A. *Held*, that on the death of A. the legal interest in the covenant survived to B., and that the executor of A. could not sue: *Anderson* v. *Martindale* (1801), 1 East, 497; Lord Kenyon, C.J., said (at p. 501):—"Though the benefit were only to one of them, yet both had a legal interest in the performance of it; and, therefore, the legal interest being joint during the lives of both, on the death of one, it survived to the other."

Lease by T., tenant for life, and R., a receiver appointed by the Court of Chancery, to H., for a term of years; covenants by H. with R., and other the receiver or receivers for the time being, and to and with such other person or persons as for the time being should be entitled to the freehold or inheritance, or to the rents and profits, of the said premises, and to and with every of them. *Held*, that an action for breach of covenant committed during T.'s lifetime could not be brought by T.'s executor, but that it must be brought by the receiver and freeholder for the time being jointly: *Southcote* v. *Hoare* (1810), 3 Taunt. 87.

Covenant by lessee with A. and B., and their respective executors, administrators, and assigns, and also with C., his executors, administrators, and assigns, to repair; A. had no legal interest in the land. *Held*, that the benefit of the covenant enured to A., B., and C. jointly, and that, after the death of A., B. and C. might join in an action on the covenant: *Wakefield* v. *Brown* (1846), 9 Q. B. 209.

CHAPTER XXX.

MUTUAL COVENANTS.

Dependent and Independent Covenants distinguished: Condition Precedent: Whether Performance of Covenant is a Condition Precedent is a Question of Construction: Causes of Dependency: Dependency owing to Time fixed for Performance of Covenants: Covenant by Defendant to be performed (i.) before, (ii.) simultaneously with, or (iii.) after, the Performance of Covenant by Plaintiff: Dependency arising from nature of Covenants: Covenant by Plaintiff the whole, or part only, of the Consideration for the Covenant by Defendant: Clauses introduced by Participles or the words "To be."

Dependent and independent covenants distinguished.

WHERE a deed contains mutual covenants a question of great nicety arises—viz., Are the covenants dependent or independent? In other words, can one of the parties bring an action against the other for breach of covenant, without having performed his own covenant? The question generally arises as a point of pleading, but the answer to it depends entirely on the construction of the deed.

Condition precedent.

The relation between covenants, one of which is dependent on the other, is sometimes expressed by saying that the performance of the one is a condition precedent to liability under the other.

Whether covenants are dependent or independent is a question of construction.

"In contracts containing executory considerations, or mutual promises, that is to say, in which a promise on the one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration, strictly so called; and the obligation of the one promise may be quite independent of the performance of the other. But it may appear upon the correct construction of the terms of such mutual promises, or from the connection of their matter, that the obligation of the one promise is, expressly or impliedly, conditional upon the due performance of the other; and then the performance of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case, the

promises are not only mutual but also dependent; in the former case, they are independent in regard to performance:" Leake on Contracts, pt. 3, c. 2 (3rd ed., pp. 647 *et seq.*).

"The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance:" per Lord Mansfield, C.J., *Kingston* v. *Preston* (1773), cited 2 Doug. 689.

Technical words not necessary.

"There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent, neither does it depend upon the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction:" per Ashhurst, J., *Hotham* v. *East India Co.* (1787), 1 T. R. 638 at p. 645.

"Conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument, and technical words (if there be any to encounter such intention) should give way to that intention:" per Lord Kenyon, C.J., *Porter* v. *Shepherd* (1796), 6 T. R. 665 at p. 668, cited with approval by Lord Chelmsford in *Roberts* v. *Brett* (1865), 11 H. L. C. 337 at p. 354.

"The rule has been established by a long series of decisions in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. . . . The parties to a contract may, undoubtedly, if they think proper, agree that" the right of one party to maintain an action against the other "shall be conditional, and shall depend on" the plaintiff's "strict performance of the covenants entered into by himself; and if words are used in the contract so precise, express, and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent it may be with general principles of reasoning, a Court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so declared:" per Tindal, C.J., *Stavers* v. *Curling* (1836), 3 Bing. N. C. 355 at p. 368; and in *Graves* v. *Legg* (1854), 9 Exch. 709, Parke, B. (at p. 716), speaks of "the numerous cases in which it

has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and, of course, to the circumstances legally admissible in evidence with reference to which it is to be construed."

"The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument:" per Byles, J., *London Gas Light Co.* v. *Chelsea Vestry* (1860), 8 C. B. N. S. 215 at p. 239.

"I do not think that the rules which are laid down as to the construction of agreements in which there are cross contracts, in order to see whether these cross contracts are dependent or independent, are of much assistance where, as here, the question is whether a matter is expressly made a condition precedent. . . . All agree that the question is, What is the intention to be collected from the words?" per Lord Blackburn, *London Guarantie Co.* v. *Fearnley* (1880), 5 Ap. Ca. 911 at p. 917.

Causes of dependency.

Covenants may be dependent, either owing to the time when they have to be performed, or owing to their nature, or subject-matter.

Dependency owing to time.

Where the dependency arises owing to the time fixed for performance, three cases may occur, for if *D.* be the thing covenanted to be done by D., and *P.* the thing covenanted to be done by P., *first*, the time for doing *D.* may be before the time for doing *P.*; *secondly*, *D.* and *P.* may have to be done simultaneously; *thirdly*, the time for doing *D.* may be after the time for doing *P.*

Where time for thing to be done by defendant may happen before time for thing to be done by plaintiff, performance by plaintiff is not a condition precedent to action.

> If the time fixed for doing *D.* must, or may, happen before the time fixed for doing *P.*, the doing of *P.* is not a condition precedent to the doing of *D.*, and P. can maintain an action without showing that he has done, or offered to do, *P.*

This rule is stated in the notes to *Pordage* v. *Cole* (1670), 1 Wms. Saund. 320, note 4 (p. 551, ed. 1871), as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed

for the performance of that which is the consideration for the money or other act."

"When one promises, agrees, or covenants to do one thing *for* another, there is no reason he should be obliged to do it till that thing, *for* which he promised to do it, be done, and the word 'for' is a condition precedent in such cases. But upon this head some diversities are to be observed. *First*, if there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incur before the time the thing, for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be 'that the party shall pay the money,' or, 'do the thing *for* such a thing,' or, 'in consideration of such a thing,' after the day is past the other shall have an action for the money or other thing, although the thing, *for* which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a consideration precedent; and, therefore, they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Vide* Y. B. 48 Edw. III. (1374), 2, 3, cited in *Ughtred's Case* (1591), 7 Rep. pt. 2, 10 b, where the diversity is taken when there are mutual remedies and not: it is thus put in that book: Sir R. Pool covenants with Sir R. Tolcelser to serve him with three esquires in the wars of France. Sir R. Tolcelser covenants, *in consideration* of those services, to pay him so much money; and there it is said, action will lie for the money without any services performed. But if you look into the book at large, you will find it was upon the diversity which I have taken; for the Case in 48 Edw. III. 2, 3, is, R. Pool covenants with R. Tolcelser to serve him with three esquires in the wars of France, and R. Tolcelser covenanted with him to pay him so much for the service; and it was further agreed, that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by Sir R. Pool, it was objected that the service was not performed; but there was no room for that objection upon the diversity which I have taken, the money, by the agreement, being made payable at a day certain, before the service was to have been performed:" per Holt, C.J., *Thorp* v. *Thorp* (1701), 12 Mod. 455 at p. 460; 1 Ld. Raym. 662; Holt, 28, 96; Lutw. 75; 1 Salk. 171.

"For."

In Platt on Covenants, p. 96, it is said: "The case in the Y. B. is

inaccurately stated by Lord Coke. . . . It appears in the Y. B. that the covenant was that half the money was to be paid in England before they went to France: the principle therefore of that case agrees with the doctrine of Holt in *Thorpe* v. *Thorpe*, as is observed by him in 12 Mod. 461."

In *Roberts* v. *Brett* (1856), 18 C. B. 561 at p. 573; 25 L. J. C. P. 280 at p. 286, Jervis, C.J., after citing this rule (as stated in the notes to *Pordage* v. *Cole*), says: "But, after all, that rule only professes to give the result of the intention of the parties: and where, on the whole (? instrument), it is apparent that the intention is that that which is to be done first is not to depend upon the performance of the thing that is to be done afterwards, the parties are relying on their remedy, and not on the performance of the condition; but where you plainly see that it is their intention to rely on the condition and not on the remedy, the performance of the thing is a condition precedent."

"It has long been the practice of companies insuring against fire . . . to incorporate in their policies . . . various stipulations for matters to be done by the assured making a claim before the Company is to pay them, and (as the remedy by action for not complying with these stipulations would not afford them any protection), to make the fulfilment of those conditions a condition precedent to their obligation to pay. . . . In the present case . . . so far as any of their stipulations . . . are for something to be done preliminary to the completion of the proof satisfactory . . . to the directors, from which completion of proof the time of the payment is to run, I think it is not disputed that they have effected their object. But such stipulations as relate to things to be done after payment is due are not, and cannot be, conditions precedent:" per Lord Blackburn, *London Guarantie Co.* v. *Fearnley* (1880), 5 Ap. Ca. 911 at pp. 915, 916.

"When the parties to a contract make a stipulation in which nothing is expressed as to time, and which might, according to its own terms, be fulfilled either within or after the period during which it could operate as a condition precedent, and the parties then go on to declare that it shall be a condition precedent, I think the declaration must, *primâ facie*, be held to be a sufficient expression of their intention to limit the time of performance to the antecedent period:" per Lord Watson, *Ibid.* at p. 920.

Examples

Agreement under seal that B. shall pay A. a sum of money for his lands on a certain day, but no day was fixed for the conveyance. *Held*, that A. might bring his action for the money before

conveyance: *Pordage* v. *Cole* (1670), 1 Wms. Saund. 319 (p. 548, ed. 1871).

B. covenanted to pay seamen's wages yearly, and "in consideration thereof, A. covenanted to pay B. 42*l.* every month." *Held*, that B. might bring an action for the 42*l.* without showing that he had paid the wages: *Russen* v. *Coleby* (1734), 7 Mod. 236.

Agreement under seal that plaintiff should take defendant as partner, to commence *from* and *after* the 29th September: covenant by the defendant to pay 300*l.* *on* or *before* that day as a premium. The plaintiff can bring an action for non-payment without tendering articles of partnership: *Walker* v. *Harris* (1793), 1 Anst. 245.

B. covenants to build a house for A., and to finish it before a certain day, in consideration of a sum of money, which A. covenants to pay him by instalments as the building proceeds. *Held*, that B. can bring his action for the money, though the building be not complete at the time appointed: *Terry* v. *Duntze* (1795), 2 H. Bl. 389.

B., in consideration of the sum of 250*l.* paid by A., and of the further sum of 250*l.* to be paid by him, covenanted with A. to teach him the art of bleaching linen with all possible despatch; and A. covenanted that he would on a certain day, or sooner if B. should before that time have instructed him, pay the further sum of 250*l.* *Held*, that B. might sue A. for the 250*l.* without averring that he had taught him the art of bleaching linen: *Campbell* v. *Jones* (1796), 6 T. R. 570.

Agreement under seal by A. to purchase, and by B. to sell, certain property, and A. thereby covenanted to pay on or before a fixed day, as the consideration of the sale, a certain sum with interest till completion. *Held*, that B. might sue for the purchase-money without previously tendering a conveyance: *Mattock* v. *Kinglake* (1839), 10 Ad. & El. 50; 2 Per. & D. 343.

Plaintiff and defendant agreed under seal to enter into partnership as apothecaries till January 1st, 1846, that defendant should pay plaintiff 800*l.*, and should be entitled to all the profits of the business, and that plaintiff should, after the 1st January, 1846, introduce the defendant as his successor, and use his best endeavours to establish him in the business; and in consideration thereof, the defendant covenanted to pay a further sum of 50*l.* to plaintiff on the 25th March, 1846. *Held*, that the introduction of the defendant by the plaintiff was not a condition precedent to the payment of the 50*l.*, as the plaintiff would still be under an

obligation to introduce the defendant after the 25th March, 1846: *Judson* v. *Bowden* (1847), 1 Exch. 162.

Covenant by defendant that within six months from the passing of a proposed railway bill, and before the company should enter upon the plaintiff's land, except for certain specified purposes, he would pay to plaintiff 4,000*l.* for the purchase of certain land; and covenant by plaintiff, that, on payment of the said sum of 4,000*l.* with interest, after the expiration of six months from the passing of the bill he would convey the land. *Held*, that plaintiff could sue for the money before conveying the land: *Sibthorp* v. *Brunel* (1849), 3 Exch. 826.

Covenant in a lease to build certain stables, "the whole of which were to be left to the superintendence of the plaintiff and the defendant's son." *Held*, that such clause was neither a condition precedent nor concurrent, and that the covenant was absolute: *Jones* v. *Cannock* (1850), 5 Exch. 713.

Plaintiff covenanted with defendant to deliver up a farm on a certain day, and in the meantime to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired term and interest, and, if defendant required, would at any time afterwards execute any deed for further assurance; and defendant covenanted with plaintiff that if plaintiff delivered up the farm, and in the meantime cultivated it on the four-course system and performed all and singular other the covenants, &c., then the defendant would pay for the manure on the delivery up of the farm. *Held*, that plaintiff could sue on the covenant to pay for the manure, though he had not delivered up the agreement: *Newson* v. *Smythies* (1858), 3 H. & N. 840. Baron Bramwell (at p. 843) said: "The defendant's covenant appears to be made conditional upon the performance of *all* the covenants on the part of the plaintiff. But some of them, such as that for further assurance, are not to be performed till after the time for payment. Therefore it is impossible to construe the covenant literally. The reasonable construction is that the plaintiff is entitled to recover for the manure, and that the breach of his covenant is the subject of a cross action." Bramwell, Watson, and Channell, BB., all point out that delivery up of the agreement was not of the essence of the contract.

The plaintiff guaranteed the payment at maturity to the defendant of certain bills held by him, and the defendant guaranteed the payment to the plaintiff of certain goods sold by him to a third person.

Held, that the guarantees were independent: *Christie* v. *Borelly* (1860), 7 C. B. N. S. 561.

Covenant by wife's father in marriage articles to make certain payments during his life, and to settle a certain portion of his estate at his death on the husband and wife during their respective lives, and after their deaths on their issue; and the husband covenanted to insure his life and to settle the policy and other property in like manner: in default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue; the husband neither insured his life nor made a settlement according to his covenant, and refused to execute a settlement drawn according to the articles. *Held*, that the performance by the husband of his covenant was not a condition precedent to the performance by the father: *Jeston* v. *Key* (1871), L. R. 6 Ch. 610.

Action on a policy guaranteeing the plaintiff against embezzlement by a servant of the plaintiff. The policy expressly stated that it was "subject to the conditions herein contained, which shall be conditions precedent to the right to recover under this policy." Among the conditions was one that the employer should, if required, prosecute the servant for any wrongful act covered by the policy. The defendants pleaded that they had required plaintiff to prosecute, but he had not done so. Lords Blackburn and Watson held that the effect was that all the conditions were expressly made conditions precedent. Lord Selborne, C., dissented on the ground that the condition in question was not in its nature precedent: *London Guarantie Co.* v. *Fearnley* (1880), 5 Ap. Ca. 911.

Where covenants are to be performed simultaneously, performance by plaintiff is a condition precedent to action.

Where *D.* and *P.* are to be done simultaneously, neither D. nor P. can maintain an action without showing that he has done, or offered to do, *D.* or *P.* respectively.

This rule is stated in the notes to *Pordage* v. *Cole* (1670), 1 Wms. Saund. 320, note (4), s. 5 (ed. 1871, p. 556), as follows: "Where two acts are to be done *at the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

Examples.

Mortgagor agreed to release his equity of redemption, "in consideration of which" the mortgagee agreed to pay him 7*l*. *Held*, that the release was a condition precedent to the payment of the money: *Thorp* v. *Thorp* (1701), 12 Mod. 455; 1 Ld. Raym. 662.

Action for debt on a bond conditioned for the payment of so much money "on request, the plaintiff assigning over to the defendant such a judgment against C." Judgment for the plaintiff, it appearing that he had offered to assign the judgment: *Turner* v. *Goodwin* (1714), 10 Mod. 154, 189, 222.

A. covenanted with B. that, upon the tender and payment by B. of a certain sum on or before a certain day, A. would transfer certain stock to B. The money not being paid, A. brought his action; but as he did not sufficiently allege a transfer or tender of the stock, judgment for B.: *Stapleton* v. *Shelburne* (1725), 1 Bro. P. C. 215.

Covenant by defendant to give up his business on a certain day to the plaintiff, and covenant by plaintiff to accept the business, and "at and before the delivery of the deeds procure good security to be given to the defendant, to be approved of by the defendant, for the payment of 250*l*. monthly to the defendant." The plaintiff sued the defendant for not giving up his business and the defendant pleaded that the plaintiff had not offered or given sufficient security; judgment for the defendant, "because the part to be performed by the plaintiff was clearly a condition precedent": *Kingston* v. *Preston* (1773), cited at length in *Jones* v. *Barkley* (1781), 2 Doug. 684 at p. 689.

Agreement by A. to sell to B. an estate for a certain sum, in consideration whereof B. agreed to pay that sum, and on failure to pay 21*l*. *Held*, that the covenants were dependent, and that A. could not recover the 21*l*. without showing a conveyance or a tender of a conveyance: *Goodisson* v. *Nunn* (1792), 4 T. R. 761.

Plaintiff covenanted to sell to the defendant a schoolhouse, and to convey the same on or before the 1st of August; and in consideration thereof the defendant covenanted to pay the plaintiff 120*l*. on or before the 1st of August. *Held*, that the plaintiff could not maintain his action for the 120*l*. without averring that he had conveyed or tendered a conveyance: *Glazebrook* v. *Woodrow* (1799), 8 T. R. 366.

Covenant by A. to convey an estate, in consideration of which B. covenants to pay certain moneys. "It is clear that these are dependent covenants, and can it be contended for an instant that though the one has not conveyed he may call upon the other to pay

the money?" per Lord Kenyon, C.J., *Heard* v. *Wadham* (1801), 1 East, 619 at p. 629.

> If the time fixed for doing *D.* must happen after the time fixed for doing *P.*, the doing of *P.* is a condition precedent to the doing of *D.*, and P. cannot maintain an action without showing that he has done, or offered to do, *P.*

Where time for thing to be done by plaintiff must happen before time for thing to be done by the defendant, performance by plaintiff is a condition precedent to action.

This rule is stated in the notes to *Pordage* v. *Cole* (1670), 1 Wms. Saund. 320, note (4), s. 2 (ed. 1871, p. 552), as follows:—"When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing, which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance."

"If there be a day for the payment of the money, or doing of other act, *for* another, and that day is to be after the performance of the thing *for* which the promise, &c., was made, there, if the agreement be to pay the money, or do other thing, '*for*' or '*in consideration*,' or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action:" per Holt, C.J., *Thorp* v. *Thorp* (1701), 12 Mod. 455 at p. 462; 1 Ld. Raym. 662.

Examples.

By marriage articles the intended husband covenanted to settle 2,000*l.* in a particular manner and the intended wife's father covenanted to make a settlement; but it was expressly agreed that, before the father should make the settlement which he had agreed to make, the husband should purchase and settle 840*l.* per annum part of the 2,000*l.* per annum. The marriage took effect, and the father died before anything was done; then the wife died without issue. *Held*, on a suit by the husband against the infant heir of the father, that the settlement of the 840*l.* by the plaintiff was a condition precedent to the performance of the covenant by the father: *Feversham* v. *Watson* (1680), Finch, Ca. Ch. 445; Freem. Ch. 35.

Agreement for sale of lands, vendors to deduce title, and purchasers to prepare conveyance and pay for the lands. *Held*, that deduction of title was a condition precedent to an action for the purchase-money: *Thames Haven Dock Co.* v. *Brymer* (1850), 5 Exch. 696.

Agreement under seal that the plaintiffs should supply, and that

the defendants should accept, coke, "to be to the satisfaction of the defendants' inspecting officer for the time being." *Held*, that it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke that it should be to the satisfaction of their inspecting officer: *Grafton* v. *Eastern Counties Railway Co.* (1853), 8 Exch. 699.

An agreement under seal between A. and B. contained several stipulations, and it was agreed and declared "that for the true performance of the covenants by A. hereinbefore contained, and for securing any penalties which he may incur under these presents," A. and two responsible sureties "shall within ten days after the execution of these presents, execute a bond to B. in a penalty of 5,000*l.*," and that B. shall execute a similar bond to A. *Held, first*, that A.'s covenant to give a bond, and B.'s like covenant were independent; *secondly*, that A.'s covenant to give a bond, and B.'s liability under his other stipulations were dependent, so that it was a condition precedent to A.'s right to recover damages against B. in respect of a breach of such stipulations, that A. should have given the bond, and that the fact of B. not having given his bond did not better A.'s position: *Roberts* v. *Brett* (1865), 11 H. L. C. 337.

Charter-parties.

In many instances this rule has been applied to the construction of charterparties, where, the covenant being that the merchant should pay the freight on delivery of the goods at a certain place, the goods were not delivered; because part of them had been taken by pirates: *Bright* v. *Cowper* (1612), 1 Brownl. & G. 21 (in this case it is not clear whether the whole, or only part of the, freight was claimed); or the ship did not arrive: *Clarke* v. *Gurnell* (1612), 1 Bulst. 167; or the ship was wrecked before arrival: *Cook* v. *Jennings* (1797), 7 T. R. 381; *Gibbon* v. *Mendez* (1818), 2 B. & Ald. 17; *Mitchell* v. *Darthez* (1836), 2 Bing. N. C. 555; or the ship was wrongfully seized and prevented from going on her voyage: *Smith* v. *Wilson* (1807), 8 East, 437; or the goods were seized by a foreign Government: *Storer* v. *Gordon* (1814), 3 M. & S. 308; or the ship, in pursuance of directions from the freighter's agent, proceeded to a port different from that named in the charterparty; *Thompson* v. *Brown* (1817), 7 Taunt. 656; or where the merchant was held justified in declining to perform his part of the contract on the ground that the ship was to sail on a certain day and failed to do so: *Glaholm* v. *Hays* (1841), 2 Man. & Gr. 257; see *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893; or that she was not ready to receive cargo at the time agreed upon: *Oliver*

v. *Fielden* (1849), 4 Exch. 135; but the discussion of cases on charter-parties is foreign to the scope of this work.

Dependency in respect of time may be illustrated by the cases in which an instrument contains an agreement to refer to arbitration any matter of dispute arising under the instrument. Arbitration.

Policy of marine insurance, condition that the sum to be paid on loss should be ascertained by arbitration, no action to be brought till after arbitration, and then only for such sum as the arbitrator should award. *Held*, that till award made no action was maintainable: *Scott* v. *Avery* (1855), 5 H. L. C. 811; *Tredwen* v. *Holman* (1862), 1 H. & C. 72; *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85. Policies.

A similar decision was given in the case of an accident policy: *Braunstein* v. *Accidental Death Insurance Co.* (1861), 31 L. J. Q. B. 17.

Fire policy, condition that loss should be paid after adjustment, any difference to be submitted to arbitration, and award to be conclusive. *Held* (Bramwell, B., dissenting), that award was a condition precedent: *Elliott* v. *Royal Exchange Assurance Co.* (1867), L. R. 2 Ex. 237; *Viney* v. *Bignold* (1887), 20 Q. B. D. 172; *Trainor* v. *Phoenix Fire Assurance Co.* (1892), 65 L. T. 825; *Spurrier* v. *La Cloche*, [1902] A. C. 446.

In *Dawson* v. *Fitzgerald* (1876), L. R. 9 Ex. 7; 1 Ex. D. 257, the defendant, a lessee, covenanted with the plaintiffs, his lessors, that he would not keep up an injurious quantity of ground game, and that in case he should do so, he would pay to the plaintiffs a fair and reasonable compensation, "the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators," &c. The plaintiffs sued for breach of the covenant to pay compensation: the defendant pleaded that there had been no reference to arbitration. A majority (Kelly, C.B., and Pigott, B.) of the Court below held that the plea was good, on the ground that the covenant to pay compensation and the covenant to refer were dependent covenants, and that arbitration and award were a condition precedent to liability. Bramwell, B., who dissented, stated his view of the law (L. R. 9 Ex. at p. 10), as follows: "If there be a covenant to pay in a certain event, and a separate and collateral covenant that, in case of difference, that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken whether the other be broken or not; and it is no matter whether the two covenants are in different deeds, or in the same deed at different parts of it, or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever

upon arbitration shall be found to be due, then no action can be maintained until the arbitration has taken place." On appeal, the judgment of the majority of the Court below was reversed. Jessel, M.R., said (1 Ex. D. p. 260): "I take the law, as settled by the highest authority—the House of Lords—to be this. There are two cases where such a plea as the present is successful; first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under s. 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration."

A clause which stipulates that all matters in difference should go to arbitration, and prohibits any action being brought in respect of matters actually submitted to arbitration is collateral and independent, and an award is not a condition precedent to action, except as regards such sums as are not payable until the amount has been determined by the award: *Collins* v. *Locke* (1879), 4 Ap. Ca. 674.

In *Babbage* v. *Coulburn* (1882), 9 Q. B. D. 235, it was held that under an agreement by a lessee to pay for dilapidations, the amount, if disputed, to be settled by valuers, the valuation was a condition precedent to the lessor's right to sue in respect of the dilapidations. Field, J., distinguished *Dawson* v. *Fitzgerald*, saying: "In that case the result was different, because there was an independent covenant to pay a fair and reasonable compensation, while here there is only a covenant to pay a sum ascertained by valuers." The case was affirmed by C.A. (*diss.*, Cotton, L.J.), 46 L. T. 794.

Dependency owing to nature of covenants.

In cases where the dependency arises from the nature of the covenants, the following rule may be laid down:—

Where covenant is sole consideration.

Where covenant is part of consideration

If *P.* be the sole consideration for *D.* (or, as it is sometimes expressed, goes to the root of the contract), P. cannot bring his action without doing, or offering to do, *P.*; in other words, the covenants are dependent; but if *P.* be part only of the consideration for *D.*, and the

non-performance of *P.* can be compensated by damages, P. can bring his action without doing, or offering to do, *P.*; in other words, the covenants are independent.

and non-performance can be compensated for.

This rule is laid down in the notes to *Pordage* v. *Cole* (1670), 1 Wms. Saund. 320, ss. 4 and 3 (ed. 1871, pp. 556 and 552), as follows: "Where the mutual covenants go to the whole consideration on both sides, they are mutual considerations, and performance must be averred." "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

The leading case on both branches of this rule is *Boone* v. *Eyre* (1777), 1 H. Bl. 273 n.; 2 W. Bl. 1312. There the plaintiff conveyed a plantation in the West Indies, with the negroes on it, in consideration of a sum down and an annuity, and covenanted that he was lawfully possessed of the negroes. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. To an action for non-payment of the annuity, the defendant pleaded that the plaintiff was not, at the time of making the deed, lawfully possessed of the negroes. On demurrer, Lord Mansfield, C.J., said (1 H. Bl. 273 n.): "The distinction is very clear: where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action."

Examples of dependent covenants.

Where the defendant covenanted to pay the plaintiff a certain sum, the plaintiff making to him a sufficient estate in certain lands before St. Thomas's Day. *Held*, that the words "the plaintiff making," &c., were a condition precedent, *i.e.*, that the covenants were dependent: *Large* v. *Cheshire* (1672), 1 Vent. 147; 2 Keb. 801. See likewise *Duke of St. Albans* v. *Shore* (1789), 1 H. Bl. 270; *Atkinson* v. *Smith* (1845), 14 M. & W. 695; *Graves* v. *Legg* (1854), 9 Exch. 709; cases of assumpsit; and *Bradford* v. *Williams* (1872), L. R. 7 Ex. 259; where Martin, B., said: "I think the words 'condition precedent' are unfortunate. The real question, apart

from all technical expressions, is, what in each instance is the substance of the contract."

Apprentice.

Where an apprentice ran away and enlisted as a soldier, it was held a sufficient excuse for his master not performing his covenant to teach him: *Cuff* v. *Brown* (1818), 5 Price, 297; *Hughes* v. *Humphreys* (1827), 6 B. & C. 680.

Where a master leaves off his business he cannot bring an action on the covenant by the apprentice to serve him: *Ellen* v. *Topp* (1851), 6 Exch. 424.

Agreement to sing in an opera at 11*l.* a week for three months, if opera ran so long. Plaintiff was, through illness, unable to perform on the opening night. *Held*, her doing so was a condition precedent to liability to engage: *Poussard* v. *Spiers and Pond* (1876), 1 Q. B. D. 410.

Condition on a season ticket for delivery up thereof on the day of expiration. *Held*, a condition precedent to obtaining the return of a deposit paid on the issue thereof: *Cooper* v. *L. B. & S. C. Ry.* (1879), 4 Ex. D. 88.

Bankers sold exchange contracts, *i.e.*, undertook to pay money in exchange for silver, but stipulated that the goods in payment for which the money was required should be financed through them. *Held*, that financing the goods as stipulated was a condition precedent: *Bank of China* v. *American Trading Company*, [1894] A. C. 266.

Where there has been part performance.

Even where the consideration goes to the root of the contract, a defendant who has had a substantial part of the consideration cannot set up the non-performance by the plaintiff of a condition precedent.

"Now whatever might have been the question if it had been raised while the agreement was executory, we are clearly of opinion that the defendant having received a substantial portion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent: per Parke, B., in *Graves* v. *Legg* (1854), 9 Exch. 709 at p. 716; *White* v. *Beeton* (1861), 7 H. & N. 42; and see the judgment of the Court in *Ellen* v. *Topp* (1851), 6 Exch. 424 at p. 441. This doctrine is well and firmly established, and is in accordance with principles of common sense and justice:" per Curiam, Cockburn, C.J., and Quain and Field, JJ., *Carter* v. *Scargill* (1875), L. R. 10 Q. B. 564 at p. 567.

Accordingly, it is impossible after a marriage to set aside the marriage contract on the ground of the failure of a pecuniary

consideration: *Campbell* v. *Ingilby* (1856), 21 Beav. 567; on app. (1857), 1 De G. & Jo. 393.

A breach of the covenant by an apprentice to serve his master faithfully is no defence to an action against the master for not teaching him according to his covenant: *Winston* v. *Linn* (1823), 1 B. & C. 460; *Phillips* v. *Clift* (1859), 4 H. & N. 168.

Examples of independent covenants.

A. covenanted with B. not to interfere in a certain branch of the Scotch fish business, and to assign to B. a certain Scotch fishery. B., in consideration of the assignment and of A.'s covenant, covenanted to pay A. an annuity. *Held*, that the covenant not to interfere in the business was only a part of the consideration for the annuity, and was therefore not a condition precedent, but an independent covenant: *Carpenter* v. *Cresswell* (1827), 4 Bing. 409; 1 M. & P. 66.

In a dissolution deed between two partners, A. and B., A. assigned to B. certain shares, and covenanted for further assurance; and B. covenanted with A. to indemnify him against certain liabilities: on a suit by B. to enforce A.'s covenant for further assurance, it was held that a breach by B. of his covenant to indemnify A. was no defence, for the covenants were independent: *Gibson* v. *Goldsmid* (1854), 5 De G. M. & G. 757; reversing 18 Beav. 584.

Covenant by lessee to deliver up a farm, and on quitting to deliver up an agreement. Covenant by lessor that if lessee did deliver up the farm and keep all other covenants, he would pay for manure. *Held*, that delivery up of the agreement was not a condition precedent to liability to pay for the manure: *Newson* v. *Smythies* (1858), 3 H. & N. 840.

The conveyances of plots forming part of a building estate contained covenants by the respective purchasers against building beyond either the front or rear building lines. In an action by a purchaser of one plot against the purchaser of the adjoining plot to restrain a breach of the covenant as to the front building line. *Held*, that the covenants were independent, and therefore the plaintiffs' right to relief was not barred by a breach on his own part of the covenant as to the rear building line: *Chitty* v. *Bray* (1883), 48 L. T. 860.

Engagement to sing in theatres, halls, and drawing-rooms for fifteen weeks, and to be at rehearsals six days before engagement began. *Held*, that the stipulation as to rehearsals was not a condition precedent: *Bettini* v. *Gye* (1876), 1 Q. B. D. 183.

A covenant in a separation deed by the husband to pay an

annuity to a trustee for the wife, and a covenant by the trustee with the husband that the wife should not molest him, are independent covenants: *Fearon* v. *Earl of Aylesford* (1884), 14 Q. B. D. 792.

Contracts to supply goods, and to pay for them are independent.

It will be observed that where A. covenants to supply goods to B., and B. covenants to pay for them, the effect of holding the performance by A. of his covenant to be a condition precedent to his right of action for the purchase-money, would be to prevent him from recovering the purchase-money if he failed in delivering any one article; while, if the covenants are held to be independent, B. can, if he is really injured by A.'s default, bring a cross action on A.'s covenant; in cases of that nature consequently the covenants are held to be independent. The following are examples.

Examples.

Covenant by plaintiff with defendants, that he being provided by defendants with rails and chairs, would complete part of the railway and the permanent way before the 1st of June; covenant by defendants with plaintiff to pay him 15,000*l.* by instalments; provision that if the plaintiff should not complete the railway by 1st of June, the defendants might retain part of the 15,000*l.* for every day of delay; defendants did not furnish the rails till after the 1st of June. *Held*, on an action for the 15,000*l.*, that the covenants were independent; and the furnishing of the rails was not a condition precedent: *Macintosh* v. *Midland Counties Railway Co.* (1845), 14 M. & W. 548.

Agreement under seal that defendants should supply, and plaintiffs purchase, all the coke required by plaintiffs for working their railway; covenant by plaintiffs that so long as the defendants should punctually supply the said coke they would abstain from purchasing coke from other persons. *Held*, that the fact of the plaintiff having purchased coke from other persons was no answer to an action brought by them against the defendants for not delivering coke: *Eastern Counties Railway Co.* v. *Philipson* (1855), 16 C. B. 2.

Plaintiffs contracted by deed with the Vestry of C. to supply gas to the public lanterns of the parish of C.; covenanting (*inter alia*) that they would to the satisfaction of the Vestry light each lamp at sunset and continue it lighted till sunrise, and also as to the purity and illuminating power of the gas. The Vestry covenanted, the plaintiffs performing their covenants, to pay a certain sum per annum for each gas lamp. On an action brought to recover the money, the Vestry pleaded non-performance by the plaintiffs of their covenants. *Held*, that the covenants by the plaintiffs and

defendants were independent: *London Gaslight Co.* v. *Chelsea* (1860), 8 C. B. N. S. 215.

Charter-parties.

See also *Ritchie* v. *Atkinson* (1808), 10 East, 295; *Havelock* v. *Geddes* (1809), 10 East, 555; *Davidson* v. *Gwynne* (1810), 12 East, 380; *Storer* v. *Gordon* (1814), 3 M. & S. 308; *Fothergill* v. *Walton* (1818), 8 Taunt. 576; 2 J. B. Moore, 630; *Stavers* v. *Curling* (1836), 3 Bing. N. C. 355; 3 Scott, 740; 2 Hodges, 237 (all cases on the construction of charter-parties).

Clauses introduced by participles or the words "to be" creating a condition precedent.

A clause introduced by a participle, or by the words "to be," may or may not be a mere qualification of the covenant with which it is connected. In the former case it forms a condition precedent to liability under the qualified covenant; in the latter it does not.

The following are examples of clauses held to be conditions precedent.

The defendant covenanted to pay a certain sum to the plaintiff, the plaintiff making him an estate in certain lands: *Large* v. *Cheshire* (1672), 1 Vent. 147.

Covenant by lessee to repair, "the lessor allowing and assigning timber for repairs:" *Thomas* v. *Cadwallader* (1744), Willes, 496.

Agreement by lessee to keep the premises in repair, "the same being first put into good order and condition by the lessor:" *Neale* v. *Ratcliff* (1850), 15 Q. B. 916.

Plaintiff agreed to sell wool to the defendant, "the names of the vessels to be declared as soon as the wool was shipped." *Held*, on an action by the plaintiff for the price of the wool on the defendant refusing to accept it, that the declaring of the names of the vessels within a reasonable time after shipping the wool was a condition precedent to the plaintiff's right to recover: *Graves* v. *Legg* (1854), 9 Exch. 709.

Power to the lessee to determine the lease, "all arrears being paid . . . without prejudice to any claim . . . which any of the parties hereto may then be entitled to for breach of any of the covenants hereinbefore contained." *Held*, that the payment of arrears was a condition precedent: *Grey* v. *Friar* (1854), 4 H. L. C. 565.

Lease with covenant by lessee to repair, the lessor having first put the same into repair pursuant to the covenant thereinafter entered into by him, with a covenant by lessor to put into repair forthwith. *Held*, that the performance of the lessor's covenant was a condition precedent: *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153.

Covenant by lessee of house to pay rent and keep premises in repair; covenant by lessor that the lessee, on giving six months'

notice before the end of the term, should have a renewed lease, "upon paying the rent, and performing and observing the covenants of the lease." *Held*, that the performance of the covenants by the lessee was a condition precedent to his privilege of having a renewed lease: *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238; in the judgment of Kay, J., in this case all the prior cases are collected.

Such clauses creating independent covenants.

The following clauses have been held not to be conditions precedent.

Covenant by lessor with lessee, "that he paying the rent and performing the covenants on his part to be performed," shall quietly enjoy. In an action by the lessee for breach of covenant, the lessor pleaded that the lessee broke his covenants, and that therefore the lessor's covenant ceased to oblige him. *Held*, on demurrer, that the words "paying and performing" did not amount to a condition precedent: *Hayes* or *Hays* v. *Bickerstaffe* (1676), 2 Mod. 34; Freem. K. B. 194; Vaugh. 118 (where the report is on the meaning of the covenant for quiet enjoyment); *Allen* v. *Babbington* (1666), 1 Sidf. 280; 2 Keb. 9, 23; *Dawson* v. *Dyer* (1833), 5 B. & Ad. 584; *Edge* v. *Boileau* (1885), 16 Q. B. D. 117.

Lease reserving the trees, covenant by lessee with the lessor that he should have liberty to fell the trees and root them up, "repairing the hedges where they grow." *Held*, that the words "repairing," &c., amounted to an independent covenant by the lessor: *Warren* v. *Arthur* (1683), 2 Mod. 317.

The defendant covenanted with the plaintiff that he, the plaintiff, "doing, fulfilling, and performing all the covenants in the indenture contained," he, the defendant, would pay an annuity. *Held*, that "doing, &c.," was not a condition precedent to payment: *Boone* v. *Eyre* (1777), 2 W. Bl. 1312.

CHAPTER XXXI.

QUALIFIED COVENANTS AND COVENANTS FOR TITLE.

Absolute Covenant qualified by Context: Covenants qualified by "but that, &c.": Inconsistent Absolute Covenants: Qualifying Words affect all Covenants in pari materiâ: Covenants for Title: Covenant for Title distinguished from Covenant for Quiet Enjoyment: Extent of Covenant for Title: Object of Covenant for Quiet Enjoyment: Disturbance necessary for Breach: What is a Disturbance: Legal Proceedings: Suit in Equity: Disturbance of Appurtenances: Construction of Particular Words: Disturbance caused by Covenantee's own act: Disturbance means Lawful Disturbance: Unless by Covenantor; or Specified Person: Who "claim under" the Covenantor: Covenant against Incumbrances: Covenant for Further Assurance: What Acts are within the Covenant: Whether Disentailing Deed can be Claimed: Duplicate Conveyance: Covenant to produce Deeds: New Covenants for Title: Original Conveyance void: Further Assurance distinguished from Estoppel.

THOUGH a covenant may be in terms absolute, it may appear from the whole deed that it was only intended to be a qualified covenant, for—

Covenant qualified by context.

A covenant general or absolute in terms may be restricted or qualified by something appearing in another part of the deed.

Thus in a conveyance, covenants for title were restricted, by an agreement in a remote part of the deed, to acts done by the covenantor himself: *Brown* v. *Brown* (1662), 1 Lev. 57; and in a lease, a covenant by the lessee to repair at all times as occasion should require, and at furthest within three months after notice, was held to be a covenant to repair only after occasion and three months' notice: *Horsfall* v. *Testar* (1817), 1 J. B. Moo. 89.

A lease contained a covenant by the lessee for the payment of rent, and also of interest on it if it should be in arrear for three quarters, and a covenant by a surety that the lessee should at all times well and truly pay the rent at the respective days therein before mentioned, and also interest, and should duly perform all the covenants, and that in case the lessee should neglect to pay the rent, &c., for forty days, the surety would pay it on demand. *Held*, that the surety was not liable before the end of the forty days, nor before demand, the latter words restraining the former: *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9.

In a separation deed, a covenant by the husband to pay an annuity of 250*l.* to the wife during her life was restricted by a recital that he had agreed to pay her an annuity of 250*l.* out of his salary as a searcher so long as he should hold the situation: *Hesse* v. *Albert* (1828), 3 M. & Ry. 406.

In *Martyn* v. *McNamara* (1843), 4 Dr. & War. 411, Sugden, C., seems to have been of opinion that the generality of a covenant by A. with X. was qualified by a restricted covenant *in pari materiâ* by A. and B. with Y.

Ambiguous words.

It must, however, be remembered that an absolute covenant will not be cut down by ambiguous words: Sugd. V. & P. (14th ed.) 605; and accordingly, where a vendor covenanted "that he was seised of a good estate in fee according to the indenture made to him by W., his vendor," it was held that the covenant was absolute, and that the reference to the conveyance by W. served only to denote the limitation and quality of the estate, and not the defeasibility or indefeasibility of the title: *Cooke* v. *Founds* (1661), 1 Lev. 40; S. C. *sub nom. Cookes* v. *Fowns*, 1 Keb. 95.

Conveyance by vendor as beneficial owner, since the Conveyancing Act, of his "estate term and interest under" a recited deed "in the piece of land coloured red in the plan" annexed to such deed. *Held*, that the statutory covenant for title extended, *quoad* the estate to that limited by the recited deed, and *quoad* the parcels to the whole land shown on the plan: *May* v. *Platt* (1900), 1 Ch. 616. The Irish case of *Delmer* v. *McCabe* (1863), 14 Ir. C. L. Rep. 377, which is apparently *contrà*, is there treated as merely a decision on the words of the particular covenant in that case.

Restrictive words rejected on the context.

Restrictive words may be altogether rejected if inconsistent with another part of the covenant. Thus, in a case where, on dissolution of partnership, B. covenanted that, for and notwithstanding any act done by him, it should be lawful for A. to receive certain moneys without any let, suit, or interruption of B., his executors, or

administrators, or any person claiming under him or them, it was held that the words "for, &c.," being inconsistent with the subsequent parts of the covenant, ought to be rejected, and that the receipt of the money by B.'s executors was a breach: *Belcher* v. *Sikes* (1828), 8 B. & Cr. 185.

"But that," &c.

The words "but that," &c., following a covenant, will be construed as part of, and as a qualification of, the covenant.

The condition of a bond was that whereas the defendant had assigned a lease for years to the plaintiff, he had not done any act to disturb the possession of the plaintiff, whereby the assignment might be impaired, hindered, or frustrated, but that the plaintiff should quietly hold and enjoy the same premises without any disturbance by the defendant or any other person. *Held*, that the words "but that," &c., referred to the premises of the condition, and meant that the lease should be enjoyed without disturbance by any person or persons by act done or to be done by the defendant: *Broughton* v. *Conway* (1564), Moore 58; Dy. 240 a.

Covenant by lessor that he had not done any act to prejudice the lease, but that the lessee should enjoy it against all persons. *Held*, that the words "but that," &c., referred to the first words "for any act done by the lessor, &c.:" *Gervis* v. *Peade* (1598), Cro. Eliz. 615; S. C. *sub nom. Peles and Jervies' Case*, Dyer, 240 a, margin.

Where performance of both covenants is impossible, each is qualified.

If a deed contains two covenants, the performance of both of which is impossible, each of the covenants is a qualified covenant.

Thus where there was an agreement to pay plaintiff 25,000*l.* by instalments for services connected with the formation of a railway, and another agreement that, if the railway should not be proceeded with, it should be referred to arbitration to say what plaintiff should be paid, it was held that the covenant for payment of the 25,000*l.* was qualified: *Hemans* v. *Picciotto* (1857), 1 C. B. N. S. 646.

Whether qualifying words in one covenant affect another covenant.

Where there are several covenants by the same covenantor, and one of them contains words restricting its generality, as, for instance, "notwithstanding any act of the covenantor," but the others contain no such qualifying words, the question arises whether the restrictive or qualifying words apply only to the covenant in which they are contained, or to the other covenants as well. It was formerly thought that if there was found in the first or last part of a sentence, or at the beginning of the first, or at the end of the last, sentence a restrictive or qualifying clause,

which in good sense might be applied to both sentences, it should be so applied; but that it was otherwise if the clause was placed in the middle of one or two sentences; and the rule was stated to this effect in the judgment in *Gainsford* v. *Griffith* (1668), 1 Wms. Saund. 58 i. at p. 60a (ed. 1871, p. 67); but the learned editor there says:—"It is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far it would now be adopted, and no farther." And the rule is expressly denied by Burrough, J., in *Nind* v. *Marshall* (1819), 3 J. B. Moo. 703 at p. 720; 1 Brod. & Bing. 319 at p. 331; *Howell* v. *Richards* (1809), 11 East, 633; *Foord* v. *Wilson* (1818), 8 Taunt. 543; *Kean* v. *Strong* (1845), 9 Ir. L. R. 74.

Lord St. Leonards' propositions.

Upon this subject Lord St. Leonards has laid down (Sugd. V. & P. 14th ed., c. 15, s. 3, pp. 605 *et seq.*), the four following propositions, viz.:—

1. "Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct."

2. "Where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification."

3. "As, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant."

4. "Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land."

Mr. Dart's criticism.

On these propositions Mr. Dart remarks (V. and P., 7th ed., c. 13, s. 5, p. 799) that "the first . . . seems to be warranted by the authorities. The second proposition is perhaps hardly accurate; for though a prior general covenant will not, it appears, be restrained by a subsequent limited covenant having a different object, yet, where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first. The third and fourth propositions seem to be unimpeachable."

The view stated in Rawle on Covenants, p. 505, is as follows :— "The class of cases which may be said to be based upon *Browning* v. *Wright* (1799), 2 Bos. & Pul. 13, appear to decide that where the instrument contains one or more general or unlimited covenants, which are connected with, or refer to, and have the same object as, one or more preceding limited covenants so as to join the latter with the former, it will be inferred that the covenantor intended that all the covenants should be restricted to his own acts or the acts of those claiming under him, and the preceding limited covenants will qualify and restrain the general ones; in other words, when it clearly appears that the covenants are as it were cast in one mould, all having the same extent, Courts will not pick out one of them in which the limitation is less strongly or distinctly expressed than in the others, and upon it fasten on the covenantor a general liability. In the absence, however, of any such direct connection with or reference to each other as would clearly lead to the above conclusion, when the limited covenants belong to a different class, or rather, have a different object from the unlimited ones, they will be held to produce no effect upon each other, and the former will not qualify the latter."

Mr. Rawle's view.

The following rule appears to include all Lord St. Leonards' propositions as amended by Mr. Dart, and also some cases which do not fall under them, and to express Mr. Rawle's views.

> If one covenant be restricted or qualified, all other covenants *in pari materiâ*, whether express or implied, are also restricted or qualified; but restrictive or qualifying words added to one covenant do not restrict or qualify other covenants, whether express or implied, *in dispari materiâ*.

Qualifying words restrict all covenants *in pari materiâ*.

In *Kean* v. *Strong* (1845), 9 Ir. L. R. 74, it was held by Crampton, J., that an unqualified covenant to renew a lease was not cut down by a qualified covenant for quiet enjoyment, the covenants not being connected with each other. His Lordship said (p. 82) :—"It would be against principle to hold that an implied covenant should qualify an express unqualified covenant, or that one distinct express covenant should qualify another express covenant neither grammatically or substantially connected with the former. I cannot, therefore, yield to the argument which would qualify the express unqualified covenant to renew by the terms of the covenant for quiet enjoyment, a covenant which, in

the deed, is separated from the former by several distinct and independent covenants: and, indeed, it may be added that two such covenants, one the covenant to renew, unqualified, and the other, the covenant for quiet enjoyment, limited to the acts of the covenantor, may well and do often co-exist in the same deed." The case is reported on appeal, *sub nom. Strong* v. *Kean* (1847), 10 Ir. L. R. 137.

The only case which does not support the rule is *Milner* v. *Horton* (1824), McClel. 647, in which it was held that words restricting the covenant for quiet enjoyment also restricted the covenants for title, and that case, it may be remarked, is also contrary to the second of Lord St. Leonards' propositions as amended by Mr. Dart, and also to his fourth proposition, and is expressly overruled by *Smith* v. *Compton* (1832), 3 B. & Ad. 189, where Lord Tenterden, C.J. (at p. 200), said:—"We have considered *Milner* v. *Horton* again since the argument, and we cannot feel ourselves bound by its authority."

"Demise."

The case of *Line* v. *Stephenson* (1838), 6 Sco. 447; 4 Bing. N. C. 678; on app. 7 Sco. 69; 5 Bing. N. C. 183, where it was held that the express covenant for quiet enjoyment restricted not only the implied absolute covenant to that effect created by the word "demise," but also the implied absolute covenant for title created by the same word, can hardly be considered as contravening the rule, as the decision proceeds upon the ground that if the implied operation of the word "demise" is restricted at all, it must be restricted for every purpose, and cannot be held to be restricted when implying a covenant for quiet enjoyment, and unrestricted when implying a covenant for title.

Examples of qualifying words applying to all covenants *in pari materiâ.*

Covenant that certain lands conveyed to the plaintiff for her jointure "are of a certain value, and shall so continue, notwithstanding any act done or to be done by" the covenantor. *Held*, that the restriction applied to both covenants: *Rich* v. *Rich* (1585), Cro. Eliz. 43.

Condition for bond to be void "if he were seised in fee the day of the obligation made of certain lands, and if said lands should be discharged of all incumbrances made by him except the jointure of his wife." *Held*, that the words "except, &c.," applied to both covenants: *Woodyard* v. *Dannock* (1600), Cro. Eliz. 762.

In a lease to two lessees, they "jointly and severally covenanted in manner following, viz.:" then followed a string of covenants in respect of the working of a colliery; after these followed a covenant by the lessor, and then a proviso "that it was thereby declared by and between the said parties," and the lessor covenanted

that the lessees might sell certain coal, they, the lessees (not saying "and each of them"), their executors, &c., paying and accounting to the lessor, &c. It was held that the implied covenant to pay contained in the proviso was joint and several by reason of the introductory words, though a covenant by the lessor was interposed: *Duke of Northumberland* v. *Errington* (1794), 5 T. R. 522.

Examples of qualifying words not applying to covenants *in dispari materiâ.*

Covenant by lessee "that he would from time to time during the term, after three months' monition, sufficiently repair, and at the end of the term leave it sufficiently repaired." *Held*, that the clause to leave it well repaired at the end of the term was distinct, and did not depend on the previous clause: *Harslet* v. *Butcher* (1623), Cro. Jac. 644.

Covenants in a conveyance of a manor by A. that he was seised in fee notwithstanding any act done by him or any of his ancestors, and that no reversion was in the King or any other, and that the manor was then of a certain annual value, and that the plaintiff should enjoy free from incumbrances by him or any of his ancestors. *Held*, that the covenant as to value was a distinct and unrestricted covenant: *Crayford* v. *Crayford* (1628), Cro. Car. 106.

Covenants in conveyance by A. that he was seised in fee notwithstanding any act done by him, &c., and that the lands were of a certain annual value. *Held*, that the covenant as to value was an absolute unrestricted covenant: *Hughes* v. *Bennet* (1638), Cro. Car. 495; 1 W. Jo. 403.

Covenant to pay annuities and to indemnify against them. *Held*, two separate covenants, the former of which was broken by non-payment, though the vendor was not asked to pay them: *Saward* v. *Anstey* (1825), 10 J. B. Moo. 55.

A covenant by a purchaser to indemnify the vendor from certain rents was held not to be restricted by the covenant to pay them being restricted to the time the purchaser was in possession: *Crossfield* v. *Morrison* (1849), 13 Jur. 565; 7 C. B. 286.

Covenants for title.

The most usual opportunity for the application of the rule was in the construction of the group of clauses contained in conveyances prior to 1882, which are usually, though inaccurately, called the covenants for title. These consisted of (1) the covenant for title strictly so called (a covenant usually omitted), (2) the covenant for right to convey, (3) the covenant for quiet enjoyment, (4) the covenant against incumbrances, and (5) the covenant for further assurance. Such covenants were either general or absolute, *i.e.*, against the acts, &c., of the whole world, and so extending to all

paramount titles and incumbrances, or limited, *i.e.*, against the acts of named persons, *e.g.*, the covenantor himself only, or the covenantor and his ancestors, &c., and when so limited extended only to defects of title or incumbrances created by such named persons. Such covenants are usually omitted from deeds executed since 1882, as by sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 51), the appropriate covenants are deemed to be included in conveyances, mortgages and settlements by reason of the grantor being expressed to convey as beneficial owner or as settlor.

Covenant for title distinguished from covenants for quiet enjoyment and against incumbrances.

The covenants for title and for right to convey have the same object, but they have an object different from that of the covenants for quiet enjoyment and against incumbrances.

In *Norman* v. *Foster* (1674), 1 Mod. 101; 3 Keb. 246; Hale, J., said: "If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me, these are two several covenants, and the first is general and not qualified by the second. And so said Wylde, J., and that one covenant went to the title, and the other to the possession."

"The covenant for title and the covenant for right to convey are indeed what is somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. . . . The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant and the indemnity it affords, it is immaterial in what respects and by what means or by whose acts the eviction of the grantee or his heir takes place: if he be lawfully evicted the grantor stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect or even know that his title is in strictness of law in some degree imperfect; but he may at

the same time know that it has not become so by any act of his own, and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expectant events of death or the like; but these imperfections, though cured so as to alleviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object:" per Lord Ellenborough, C.J., *Howell* v. *Richards* (1809), 11 East, 633 at p. 642.

Date from which Statutes of Limitation run.

"There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another, as in this case by the lease, its mere existence rendering the land of less value. The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry:" per Kelly, C.B., *Spoor* v. *Green* (1874), L. R. 9 Ex. 99 at p. 116; *Turner* v. *Moon*, [1901] 2 Ch. 825. The difference is material when the measure of damages, and the date from which the Statutes of Limitation run, have to be considered: *Bunny* v. *Hopkinson* (1859), 27 Beav. 565; *Spoor* v. *Green* (1874), L. R. 9 Ex. 99; *Turner* v. *Moon*, [1901] 2 Ch. 825.

Both covenants for title qualified.

The following cases are examples of both the covenant for title, strictly so-called, and the covenant for right to convey being qualified by restrictive words in one of such covenants.

Restricted covenant for seisin, followed by absolute covenant for right to convey. *Held*, that the latter covenant was qualified; "for if he was seised in fee, he had a right to sell, and when by the first covenant he covenants against his own acts, it cannot be intended that immediately by another covenant to the same effect he would covenant against all the world:" *Nerrin* v. *Munns* (1683), 3 Lev. 46.

Conveyance in fee with warranty against the vendor and his heirs; qualified covenant by the vendor for seisin, followed by absolute covenant for right to convey. *Held*, that the latter was qualified: *Browning* v. *Wright* (1799), 2 Bos. & Pul. 13. The remarks of Lord Eldon, C.J., as to the effect of covenants for title are most instructive. He says (at pp. 22 *et seq.*): "It is certainly true that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument. . . . If a man purchase an estate of inheritance, and afterwards sell it, it is to be understood, *primâ facie*, that he sells the estate as he received it; and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestors; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says: 'I sell this land in the same plight that I received it, and not in any degree made worse by me.' It was argued that, if this were so, a man who has only an estate for life might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser in the same situation in which he stood himself. If he has bought an estate in fee, and, at the time of the resale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case, the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship nor injustice can ensue. . . . *Primâ facie*, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property. . . . All the muniments of a freehold estate, and everything which can illustrate the title, is in possession of the vendor; but this is seldom the case with respect to leaseholds. With regard to many estates it would be next to impossible to show anything but the lease itself; the vendors could not produce the muniments of their estates. It sometimes happens, therefore, that parties require covenants in

Lord Eldon on covenants for title.

Vendor entitled by descent or devise.

Leaseholds.

assignments of this kind of property which are not required in conveyances of freehold; such as, an absolute covenant that the vendor holds a valid and indefeasible lease."

Leaseholds.

In the assignment of a lease the vendor covenanted that he had not done, &c., any act, &c., whereby, &c., the premises were incumbered, &c., and that for and notwithstanding any such act, &c., the lease was valid, and that he had good right to assign. *Held*, that the covenant for right to assign was restricted: *Foord* v. *Wilson* (1818), 2 J. B. Moo. 592; 8 Taunt. 543.

In another assignment of a lease the covenants were that notwithstanding any act of the assignor, the lease was valid; and further that it should be lawful for the assignee to enter and enjoy during the term without lawful disturbance by the assignor, his executors, administrators, or assigns, or any of them, *or any other person or persons whomsoever*, having or lawfully claiming any estate, right, or interest in the premises, and that, free, &c., from all former and other gifts, &c., whatsoever made, done, or permitted by the assignor, his executors, and administrators. Then followed a qualified covenant for further assurance. It was held (*dissentiente* Park, J.) that the covenant for quiet enjoyment was qualified, not, as has been sometimes said, by the words in the other covenants, but by the concluding words "and that free," &c., from all incumbrances created by the assignor himself: *Nind* v. *Marshall* (1819), 3 J. B. Moore, 703; 1 Brod. & B. 319. This case is discussed in Platt, Cov. 373; Rawle, Cov. 509.

L., being entitled to a term of eleven years if C. should so long live, by indenture reciting the demise to him for eleven years, but not stating the term to be determinable on C.'s death, assigned the term to S., habendum for eleven years, and covenanted with S. that, notwithstanding any act by him done or knowingly suffered or omitted, the lease was valid, and that the same, and the term of eleven years therein expressed were respectively in full effect, and in no wise become void, &c., otherwise than by effluxion of time, and also that for and notwithstanding any such act, &c., he had right to assign, with a covenant for quiet enjoyment during the term without disturbance by L. or any one rightfully claiming through him. C. was dead before the date of the assignment. *Held*, that the covenant that the lease and term were in full effect was restricted to the acts of the vendor, &c.; and therefore that the determination of the term by the death of C. was not a breach: *Stannard* v. *Forbes* (1837), 6 Ad. & E. 572; 1 Nev. & Per. 633.

"Demise."

In *Nokes' Case* (1599), 4 Rep. 80 b; S. C. *sub nom. Nokes* v.

James, Cro. Eliz. 674; *Merrill* v. *Frame* (1812), 4 Taunt. 329; and *Line* v. *Stephenson* (1838), 6 Sco. 447; 4 Bing. N. C. 678; 7 Sco. 69; 5 Bing. N. C. 183; an express covenant for quiet enjoyment was held to qualify the generality of the covenant to the same effect implied in the word "demise."

Covenant for quiet enjoyment not qualified.

On the other hand, it has been held, that the generality of a covenant for quiet enjoyment was not restricted by a qualified covenant for title: *Howell* v. *Richards* (1809), 11 East, 633 (where Lord Ellenborough, C.J., said (at p. 643): "In looking at the case of *Browning* v. *Wright* (1799), 2 Bos. & Pul. 13, in which almost all the cases on the subject are collected and considered, I do not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant"); *Young* v. *Raincock* (1849), 7 C. B. 310; and that the generality of the covenant for title was not restricted by a qualified covenant for quiet enjoyment: *Norman* v. *Foster* (1674), 1 Mod. 101; *Smith* v. *Compton* (1832), 3 B. & Ad. 189. So a covenant in the assignment of a lease that the lease was good was not restricted by a qualified covenant for quiet enjoyment: *Gainsford* v. *Griffith* (1668), 1 Wms. Saund. 58 i; 2 Keb. 76, 201, 213; 1 Sidf. 328; or by qualified covenants against incumbrances, for quiet enjoyment, and further assurance: *Barton* v. *Fitzgerald* (1812), 15 East, 530; and a covenant, in the assignment of a share in a patent, for right to assign was not restricted by a subsequent covenant "that he had not by any means, directly or indirectly, forfeited the right or authority that he might have over the same:" *Hesse* v. *Stevenson* (1803), 3 Bos. & Pul. 565.

In *Trenchard* v. *Hoskins* (1628), Winch. 91, Litt. Rep. 62, 65, 185, 203, the covenants were that the vendors were seised in fee, and that they or one of them had good right to convey, and that there was no reversion or remainder to the King by any act done by them. Notwithstanding the statement in Platt on Covenants, 376, that it is doubtful how the case was decided, citing 1 Wms. Saund. 60 (note), and 1 Sidf. 328, it appears that the decision on appeal (1629) (Litt. Rep. 203) was for the plaintiff, *i.e.*, that the qualifying words did not restrain the first covenants.

Extent of covenant for right to convey.

A covenant for right to convey extends both to the covenantor's title, and to his capacity to convey.

A covenant by a husband that he and his wife had good right to convey was broken by her being under age: *Nash* v. *Ashton* (1683), T. Jo. 195.

The usual qualified covenant for right to convey, *i.e.*, qualified so as to extend only to the acts of the grantor and persons through whom he claims otherwise than by purchase, is not broken by the grantor having given an acknowledgment of an encroachment upon, or of having opened windows which get light from, adjoining land.

Acknowledgment given for lights, &c.

Action on the usual qualified covenant for good right to convey "notwithstanding any act, &c., done or permitted to the contrary by the vendor or any person or persons claiming through, under, or in trust for him." Prior to the conveyance the defendant had pulled down an old house and built a new house on the land, to which he had a good title, but in building the new house he encroached upon the adjoining premises and made the cornice and spouts to his house project over his neighbour's land, and also put in new lights overlooking it. In respect of the land overhung by the cornice and spouts the defendant had no title, and the neighbour called upon the defendant to acknowledge the encroachment, which he did, and entered into an agreement to pay 5*s*. a year so long as the cornice, spouts and windows should be used by him. *Held*, that such agreement was not a breach of the covenant. "The operation of a qualified covenant for title is well known, and has been established by a series of cases, and I do not feel myself justified in departing from the construction established by those decisions. Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is, and to satisfy himself that he has a good title. The vendor then makes a conveyance, and usually covenants that he has done no act to affect or derogate from his title. If the vendor had no title at all to the property conveyed there would be no breach of such a covenant. It is said that because the defendant acknowledged the encroachment and made an agreement with the owner of the adjoining premises to pay an annual sum in respect of it, those two facts constitute a breach of the covenant; but neither of those acts was any thing which rendered the defendant's title worse than it was originally:" per Erle, C.J., *Thackeray* v. *Wood* (1865), 6 B. & S. 766 at p. 773.

Object of covenant for quiet enjoyment.

A covenant for quiet enjoyment is a covenant to secure the possession of the covenantee.

Accordingly the covenant is broken if the property be in lease, so that the covenantee cannot obtain possession: *Ludwell* v. *Newman* (1795), 6 T. R. 458; but the covenant is not a covenant guaranteeing that the covenantee may use the land in any manner he pleases. Thus, where a lessor, who had bought property subject to

a restrictive covenant not to carry on the trade of a beer seller, leased a part of it without any such restriction, and the lessee opened a public house, but was restrained by injunction at the suit of his lessor's vendor, it was held, in an action by the lessee for breach of the covenant for quiet enjoyment, that there was no breach, as the covenant did not amount to a warranty to the lessee that he might use the property for any purpose he pleased, and this, though certain other trades were expressly excepted: *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316, where the Court said (at p. 326):—

Legal proceedings.

"There can be no doubt that a proceeding of the Court of Chancery or of a court of common law, interfering with the title and possession of the land, does amount to a breach of the covenant for quiet enjoyment, as in the case of dower, common, rent, or such like: *Calthorp* v. *Heyton* (1676), 2 Mod. 54; *Hunt* v. *Danvers* (1680), T. Raym. 370. On the other hand, it has long been settled that such a proceeding, interfering only with a particular mode of enjoyment of the land, or part of it, but not with the title or possession, is not a breach: *Morgan* v. *Hunt* (1690), 2 Vent. 213."

But in *Sanderson* v. *Mayor, &c. of Berwick* (1884), 13 Q. B. D. 547 at p. 551, in the written judgment of the C. A., it is said:—"We have not lost sight of the observations on the nature of such a covenant which were made by Willes, J., in *Dennett* v. *Atherton*. But it appears to us to be in every case a question of fact, whether the quiet enjoyment of the land has or has not been interrupted, and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

Disturbance necessary.

But "in all cases where any person hath title the covenant (for quiet enjoyment) is not broken until some entry or other actual disturbance be made by him upon his title:" Shep. Touch. 171, adopted by Brett, M.R., in *Howard* v. *Maitland* (1883), 11 Q. B. D. 695 at p. 701. In that case, in a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment, notwithstanding any act or thing done or suffered by him, or any of his ancestors or predecessors in title. After the conveyance, a decree was made in a suit in chancery, in which the plaintiff in the action, though not a party to the suit, was represented, being one of a class of persons against whom the suit was brought, and by the decree the land conveyed by the defendant was declared to be subject to a general right of common over it; it was

held that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. But Brett, M.R., said that if, after that decree, anybody had brought an action against the plaintiff for interfering with the right of common, he would have had no defence, and he was not prepared to say that judgment recovered in such an action might not have been a disturbance.

Suit in equity.

It used to be thought that a suit in equity was not a disturbance within the meaning of the covenant, on the ground that a court of law could not recognise proceedings in equity; but it is now decided that a suit in equity, by which the covenantee is disturbed, is a disturbance within the meaning of the covenant: *Selby* v. *Chute* (1613), 1 Moore, 859; Brownl. & G. 23 (this report is wrong; see T. Raym. 371); *Calthorp* v. *Hayton* (1676), 2 Mod. 54; *Hunt* v. *Danvers* (1680), T. Raym. 370; *Morgan* v. *Hunt* (1690), 2 Ventr. 213.

Examples of disturbance.

The excavation of quarries in land over a demised mine, whereby water percolates into the demised mine, is a breach of the covenant for quiet enjoyment: *Shaw* v. *Stenton* (1858), 2 H. & N. 858; but the flooding of a mine not caused by any direct act of interruption, or by any act the consequences of which were or ought to have been foreseen at the time the covenant was entered into, is not a breach: *Harrison* v. *Muncaster*, [1891] 2 Q. B. 680.

The lessor is liable for damage caused by the proper user, by the lessee of adjoining land of the lessors, of drains passing through the demised land whereby water escaped on to the demised land, the drains having been imperfectly constructed: *Sanderson* v. *Mayor of Berwick* (1884), 13 Q. B. D. 547; and for inconvenience caused by the lessors painting a demised house in pursuance of a covenant in that behalf: *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351; but is not liable for injury, to a particular class of goods used in a trade for which part of house was let, by the reasonable and ordinary use of the remainder of the house: *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88; nor for building up an adjoining house so as to make the lessee's chimneys smoke: *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797; dissenting from *Tebb* v. *Cave*, [1900] 1 Ch. 642.

A nuisance committed by the lessor on his adjoining land is not a breach of the covenant for quiet enjoyment: see per Kekewich, J., *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71 at p. 76.

Disturbance must be by act done after covenant entered into.

The disturbance must be caused by some act done after the grant of the lease. The owner of a house let it off in floors, and water for each floor was conveyed thereto from a cistern by means

of a main pipe and a branch therefrom on each floor. A branch pipe burst on an upper floor and flooded the plaintiff's floor and injured his goods. *Held*, that the lessor was not liable on his covenant for quiet enjoyment because "after the lease had been granted there was no breach of any duty, there was no act of either commission or omission, and no negligence. . . . The covenant being prospective no breach of it was committed. In the cases which have been cited to us (viz.: *Andrews* v. *Paradise* (1724), 8 Mod. 318; *Shaw* v. *Stenton* (1858), 2 H. & N. 858; and *Calvert* v. *Sebright* (1852), 15 Beav. 156), an authority to do an act had been given by the lessor before the granting of the lease, and afterwards an act had been done pursuant to that authority. . . . It was, therefore, an act for which the lessor was responsible . . . and the act was done during the enjoyment by the lessee:" *per* Brett, L.J., *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602 at p. 607. In the somewhat similar case of *Blake* v. *Woolf*, [1898] 2 Q. B. 426, the judgment does not turn on the liability under the covenant for quiet enjoyment, which is not mentioned.

Unless expressly extended.

But the covenant may be so worded as to extend to past acts. Thus, where a man in 1666 covenanted for quiet enjoyment for nine years from 1664, a plea that the lessee had not been disturbed *ab et post* the sealing of the indenture was held bad: *Lewis* v. *Hellior* or *Helliar* (1668), 2 Keb. 291, pl. 73; 377, pl. 38.

Things appurtenant, &c.

The covenant for quiet enjoyment extends to everything that is appurtenant or incident to the grant to which it relates: *e.g.*, a right of way of necessity over the covenantor's other ground: *Andrews* v. *Paradise* (1724), 8 Mod. 318; *Morris* v. *Edgington* (1810), 3 Taunt. 24; but it does not extend the operation of the grant. Thus, in *Leech* v. *Schweder* (1874), L. R. 9 Ch. 463, where there was a lease with an ordinary covenant for quiet enjoyment, Mellish, L.J., said (at p. 474): "The covenant for quiet enjoyment does not increase or enlarge the rights which were granted by the previous part of the conveyance," and it was accordingly held that the covenant for quiet enjoyment gave no further right to an access of light than the lessee had under the demise.

"During the term."

Covenant that lessee should hold land "during the term," "without interruption, and discharged from tithes," and further, "if the tithes were recovered against him *during the term*," to recoup him. *After the term*, an action was brought against the lessee for tithes which had accrued due *during the term*. *Held*, that this was within the words of the covenant: *Lanning* v. *Lovering* (1602), Cro. Eliz. 916.

In *Evans* v. *Vaughan* (1825), 4 B. & C. 261; 6 Dow. & Ry. 349, where a tenant for life demised for a term of years, it was held that the words "during the said term" meant during the term which the lessor purported to grant, and not merely a term determinable on the death of the lessor.

"Acts."

"Means."

"The word 'acts' means something done by the person against whose acts the covenant is made, and the word 'means' has a similar meaning, something proceeding from the person covenanting," or the person against whose acts the covenant is made: *Spencer* v. *Marriott* (1823), 1 B. & C. 457 at p. 459; 2 D. & Ry. 665. In that case, the mesne lessor omitted to inform her lessee that there was a clause in the original lease prohibiting the carrying on of trade, and the lessee underlet to a tenant who was evicted for doing so. This was held to be no breach of the mesne lessor's covenant against eviction by or from her or by or through her acts, means, right, title, forfeiture, privity, or procurement. To the same effect is *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316.

But if a lessee, subject to a condition of re-entry on non-payment of rent, underlets and covenants for quiet enjoyment "without the impeachment of him or of any other occasioned by his impediment, interruption, means, procurement, or consent," and the sub-lessee is ejected for default of his lessor in paying the rent reserved by the original lease, this is a breach of the covenant: *Stevenson* v. *Powell* (1612), 1 Bulstr. 182.

"Means and procurement."

But "'means and procurement' have a large extent" (Palmer, 340); so that in *Butler* v. *Swinnerton* (1622), 2 Roll. Rep. 286; Palm. 338; Cro. Jac. 656, where a husband procured a conveyance to himself and his wife, remainder to his heirs, it was held that the wife claimed "by the means" of the husband, "although she claimed by title derived from another."

"Neglect and default."

"A *neglect* and a *default* seem to imply something more than the mere want of discretion with respect to his [*i.e.*, the covenantor's] own interests; something like the breach of a duty or legal obligation existing at the time; these words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do; and the not preventing or avoiding some danger to the title, which he might have prevented or avoided:" per Tindal, C.J., *Woodhouse* v. *Jenkins* (1832), 9 Bing. 431 at p. 441; 2 Moo. & Sc. 599 at p. 615, in which case a lessee, who held under a lease granted by a tenant for life and remainderman in tail with notice of their title, granted an underlease with a covenant against ejectment by him, his heirs, executors,

&c., "or by any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement;" the underlessee was ejected by a remainderman in fee, the tenant in tail having died without issue. *Held*, that the covenant was not broken. "No *act* is done by the lessor; no *consent* is given to the eviction; there is no *privity*, no *procurement*:" per Tindal, C.J., *Ibid.* at p. 441.

"Default."

There is a dictum of Lord Loughborough, C., in *Lady Cavan* v. *Pulteney* (1795), 2 Ves. Jun. 544; (1797), 3 Ves. 384, to the effect that a lessor who, reciting that he was seised in fee, covenanted for quiet enjoyment against himself, or by his default, &c., and who always had it in his power by an easy act, as suffering a recovery, to make himself owner of the land which he leased, would be liable as for his default if he neglected to do so and his tenants were ejected by the remaindermen; on which Lord St. Leonards observes (Sugd. V. & P. (14th ed.), p. 603) that "The ground of this opinion must have been that the eviction was owing to the *default* of the lessor in not suffering a recovery."

Quit rents accrued before conveyance to purchaser.

Covenant, in conveyance in fee, for quiet enjoyment, "without any action, &c., by" defendant, or those claiming under him, or by or through his or their "acts, means, *default*," &c. *Held*, that a breach was well assigned in respect of certain quit rents in arrear at the time of the conveyance, though not stated to have accrued while the covenantor was owner of the premises, on the ground that it was owing to his "default" that they remained unpaid: *Horres* v. *Brushfield* (1803), 3 East, 491.

Lord St. Leonards observes on this case (Sugd. V. & P. (14th ed.), p. 602) that the argument of the Court would apply to a mortgage or any other incumbrance created by a former owner, and adds a caution as to applying this decision to cases arising in practice.

Rents.

It has been held that a covenant for quiet enjoyment, "and that clearly acquitted of and from all grants, &c., rentcharges," &c., extends to a quit rent payable to the lord of the manor *ratione tenurae*, although not in arrear at the time of conveyance, "for a quit rent is a rent:" *Hammond* v. *Hill* (1709), Comyns, Rep. 180.

"Permit and suffer."

"The words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to;' the meaning of them is that the defendant [the covenantor] should not concur in any act over which he had a control:" per Bayley, J., and "the covenant extends to such permissive acts only as have, through the permission, an operative effect in charging the estate:" per

Holroyd, J., *Hobson* v. *Middleton* (1827), 6 B. & C. 295 at pp. 303 and 304; 9 D. & R. 249, where it was held that a covenant by the vendor's dower trustee, that he had not "permitted or suffered," &c., was broken by his having previously conveyed his estate away, but not broken by his being a party to a conveyance whereby the vendor made a mortgage.

"Suffer."

But where a lessor was bound to "suffer" his lessee to enjoy, "and that without interruption by himself or any other," it was held that an entry on the lessee under an elder title was no breach, unless the lessor actually procured the disturbance: *Anon.* (1567), Dy. 255 a, pl. 4.

"Suffer," charging order.

In *Roffey* v. *Bent* (1867), L. R. 3 Eq. 759, Lord Romilly, M.R., said, "the word 'suffer' . . . may, undoubtedly, be used in an active sense; but when the words 'shall do or suffer any act' are used, it is to be understood as meaning to endure or sustain, and to apply to something being done *in invitum;*" and consequently, held, that a charging order on a fund was an act suffered by a person, who thereby lost his interest in a fund.

"Permit."

A covenant by defendant to permit the plaintiff to sow clover among the defendant's barley is not broken by the defendant sowing his barley without notice to the plaintiff, for the defendant does not thereby prevent the plaintiff from also sowing: *Hughes* v. *Richman* (1774), 1 Cowp. 125.

Disturbance caused by covenantee's own act is not a breach.

A covenant for quiet enjoyment is not broken when the disturbance, &c., is the natural consequence of the covenantee's own act or default.

"All the judges agreed that when a man binds himself and his heirs to warranty, they are not bound to warrant new titles of actions accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made. . . . And also here the heir, who is executor and plaintiff in this action, is the cause of the breach of the condition, whereof he shall not himself take advantage so as to give himself an action by his own act:" *Executors of Grenelife* v. *W*—— (1539), Dy. 42 a at p. 42 b. The action in this case was on the warranty on the sale of a copyhold, and the lord entered for rent falling due after the sale. See to the same effect, *Anon.* (1537), Dyer, 30 a, where the covenant was for enjoyment "without interruption of any one."

The defendant leased a house to the plaintiff with an absolute covenant for quiet enjoyment. *Held*, that by obtaining an injunction against the plaintiff for ploughing up meadows the defendant

had not broken his covenant. This case appears to have been decided on the ground that the disturbance was not in estate or title: *Morgan* v. *Hunt* (1690), 2 Vent. 213.

Disturbance means lawful disturbance.

The word "disturbance" in the covenant for quiet enjoyment means lawful disturbance only, unless (i.) by the covenantor himself, or (ii.) a person specially named.

Covenant extended to tortious disturbances.

Of course the covenant may be so worded as to extend to tortious disturbances: *e.g.*, "against all claiming *or pretending to claim* any right:" *Chaplain* v. *Southgate* (1717), 10 Mod. 384; S. C. *sub nom. Southgate* v. *Chaplin*, 1 Com. Rep. 230; *Hunt* v. *Allen* (1622), Winch. 25.

Recital.

A recital may show that the covenant is intended to apply to the acts of a particular person: *Perry* v. *Edwards* (1720), 1 Stra. 400.

Mr. Preston (Shep. Touch. 166) says: "It is now settled that a general warranty of title or enjoyment, extends only to evictions by persons having title, while a covenant for enjoyment without eviction by persons particularly named, is a warranty against wrongful as well as rightful entries, &c."

"When a man covenants his lessee shall enjoy his term against all men, he doth neither expressly covenant for his enjoyment against tortious acts, nor doth the law so interpret his covenant:" *Hayes* v. *Bickerstaff* (1670), Vaugh. 118 at p. 123.

"The rule has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is, because as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import, that is, to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise:" per Lord Ellenborough, C.J., *Nash* v. *Palmer* (1816), 5 M. & S. 374 at p. 379.

Examples.

A. leased for years, with a clause of warranty. The lessee was ousted by one who had no right. *Held*, that the lessee could not maintain covenant against the lessor, for he was ousted by wrong, and had his remedy by trespass or ejectment against the

man who ousted him, but if he be ousted by title paramount, then as he has no remedy against the person ousting him, he would have a remedy against the lessor by the warranty: Y. B. 26 Hen. VIII. (1534), 3 b, cited 2 Wms. Saund. 177 a (ed. 1871, vol. 2, p. 525).

The following are examples:—Y. B. 22 Hen. VI. (1443), 52, pl. 26, cited *Dudley* v. *Folliott* (1790), 3 T. R. 584 at p. 587 (note); *White* v. *Ewer* (1601), Cro. Eliz. 823; *Chantflower* v. *Priestly* (1602), Cro. Eliz. 914; S. C. *sub nom. Chanudflower* v. *Prestley*, Yelv. 30; *sub nom. Chandflower* v. *Waterhouse and Presbye*, Noy, 50; *Kirby* v. *Hansaker* (1612), Cro. Jac. 315; *Tisdale* v. *Essex* (1616), Hob. 34; Moore, 861; 1 Roll. Rep. 397; *Broking* v. *Cham* (1617), Cro. Jac. 425; *Leigh* v. *Gotyer* (1617), Cro. Jac. 444; *Hamond* v. *Dod* (1625), Cro. Car. 5; *Wotton* v. *Hele* (1670), 2 Wms. Saund. 175 n (ed. 1871, p. 524); S. C. *sub nom. Wootton* v. *Heal*, 1 Mod. 66, 290; 1 Lev. 301; 1 Sidf. 466; 2 Keb. 684, 703, 709, 723; *Watkeys* v. *De Lancey* (1785), 4 Doug. 354; *Dudley* v. *Folliott* (1790), 3 T. R. 584; *Seddon* v. *Senate* (1810), 13 East, 63 at p. 69; *Hall* v. *City of London Brewery Co., Ltd.* (1862), 2 B. & S. 737; *Jeffryes* v. *Evans* (1865), 19 C. B. N. S. 246.

Exceptions: (1) Disturbance by covenantor.

Where the disturbances, &c., are those of covenantor himself, or of his heirs or executors, the covenant extends to unlawful disturbances.

It was held in *Davie* v. *Sacheverell* (1635), 1 Roll. Abr. 429, pl. 7, that a lessor's covenant against *lawful* disturbance by the lessor is not broken by his entry as a mere trespasser on the lessee; but subsequently a distinction was taken between a tortious entry by a stranger and by the covenantor himself; and it is now admitted law that the covenantor cannot plead that his entry was unlawful in order to avoid the consequences of his own wrongful act; for, as against the covenantor himself, the Court will not consider the word "lawful:" Platt, Cov. 319, citing *Andrew's Case of Gray's Inn* (1590), Cro. Eliz. 214; *Corus* v. —— (1596), Cro. Eliz. 544; *Penning* v. *Plat* (1615), Cro. Jac. 383; *Tisdale* v. *Essex* (1616), Hob. 34; *Cave* v. *Brookesby* (1635), W. Jo. 360.

The following are examples:—*Ratcliff* v. —— (1617), 1 Brownl. & G. 80 (where the entry was by the executors); *Hunt* v. *Allen* (1622), Winch. 25; *Crosse* v. *Young* (1685), 2 Show. 425; *Lloyd* v. *Tomkies* (1787), 1 T. R. 671 (in the two last-named cases the acts done by the covenantor amounted to a claim of title by him); *Andrews* v. *Paradise* (1724), 8 Mod. 319 (where the covenantor erected a gate across a way leading to the close which he had conveyed).

There is a dictum to the contrary, where the entry was for

sporting: per Lord Ellenborough, C.J., *Seddon* v. *Senate* (1810), 13 East, 63 at p. 72, but this cannot be relied on.

(2) Disturbance by specified person.

Where the disturbances, &c., are those of a specified person they extend to all his acts, both lawful and unlawful.

The following are examples:—*Foster* v. *Mapes* (1589), Cro. Eliz. 212; Ow. 100; 1 Leon. 324; *Lucy* v. *Leviston* (1673), Freem. K. B. 103; 3 Keb. 163; *Nash* v. *Palmer* (1816), 5 M. & S. 374; *Fowle* v. *Welsh* (1822), 1 B. & C. 29; 2 D. & Ry. 133.

Who are persons claiming under covenantor.

As the covenant for quiet enjoyment usually extends to the acts of persons claiming under the covenantor, it is necessary to consider who are persons "claiming under" the covenantor.

Appointee under power.

Covenant for quiet enjoyment, against the acts of "any person or persons claiming or to claim by, from, or under" the lessor, in a lease of land which was limited to him for life, remainder to trustees to secure a jointure of 500*l.* for his wife, with remainders over, and a joint power in the lessor and his wife to revoke and appoint new uses. The power of revocation was exercised, new uses appointed, and a person taking under the appointment evicted the lessee. It was held that "as the husband was a necessary party to the second declaration of uses by which the estate was limited to the evictor, the evictor certainly claimed under him within the meaning of the covenant. Undoubtedly the husband had covenanted against his own acts, and the new limitations were created by one of his acts:" *Hurd* v. *Fletcher* (1778), 1 Doug. 43.

Prior appointee.

Prior mortgagee.

It has been held that a covenant for quiet enjoyment against all persons "claiming by, from, or under" the covenantor is broken by the entry of a prior appointee under a joint exercise of a power by A. B. and the covenantor: *Calvert* v. *Sebright* (1852) 15 Beav. 156; or by the entry of the mortgagees of a term created before the lease with the concurrence of the covenantor, and assigned to the mortgagees with his concurrence, though the estate did not pass from him: *Carpenter* v. *Parker* (1857), 3 C. B. N. S. 206; 27 L. J. N. S. C. P. 78.

Tenant in tail.

A tenant in tail is a person claiming under the covenantor, who settled the land on himself for life, remainder to the tenant in tail: *Evans* v. *Vaughan* (1825), 4 B. & C. 261; 6 Dow. & Ry. 349.

Resettlement.

A., being seised of an undivided moiety of a piece of land, settled it on himself for life, remainder to his eldest son in tail, and subsequently leased it, with a covenant for quiet enjoyment against any acts of himself, his heirs or assigns, "or any other person lawfully claiming by, from, or under him"; afterwards, on his eldest son's marriage, the land was settled on A. for life, remainder on his

son for life, remainder on such of his son's sons as his son should appoint. *Held*, that a grandson, to whom his son had appointed it, claimed under A.: *Steele* v. *Mitchell* (1840), 2 Dr. & Wal. 568; 3 Ir. Eq. R. 1.

Dower.

A man's widow claims under him in respect of her dower, but his mother does not: *Anon.* (1624), Godb. 333.

Superior landlord.

A superior landlord is not a person claiming through the lessor, so the lessor is not liable for entry by the superior landlord even on a breach by the lessor of his covenants: *Kelly* v. *Rodgers*, [1892] 1 Q. B. 910; *Jones* v. *Lavington*, [1903] 1 K. B. 253; but where the lessor improperly consented to judgment in an action for recovery of possession by the superior landlord, he was held liable on his covenant as his act in consenting to judgment for possession was the cause of the tenant being turned out: *Cohen* v. *Tannar*, [1900] 2 Q. B. 609.

Distress for land tax, due prior to demise.

And it has been held that a distress for land tax due from the covenantor prior to a demise is not a breach of a covenant for quiet enjoyment, without any disturbance of or by the lessor "or any other person lawfully claiming or to claim from or under him;" for "the plaintiff's quiet enjoyment had not been disturbed by any one claiming by, from, or under the defendant, but by some one claiming against him:" per Lord Denman, C.J., *Stanley* v. *Hayes* (1842), 2 Gale & D. 411 at p. 413; 3 Q. B. 105.

Covenant against incumbrances extends to those of which covenantee has notice.

A covenant against incumbrances extends to those incumbrances of which the covenantee has notice.

This is decided in *Levett* v. *Withrington* (1687), Lutw. 317 (Nelson ed. 97); *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11, in which case a vendor whose title depended on the construction of a will, which was fully recited in the conveyance, was held liable on the usual covenants for title extending to the acts of the testator, the purchaser having been evicted by persons claiming under an alternative construction of the will; *G. W. Ry.* v. *Fisher*, [1905] 1 Ch. 316. *Hunt* v. *White* (1868), 37 L. J. Ch. 326, which is *contrà*, is overruled.

Covenant for further assurance.

A covenant for further assurance only extends to the estate conveyed.

Under a covenant for further assurance the covenantee is not entitled to an assurance of any further or other estate than that conveyed by the deed containing the covenant, or to payments of

duties on reversionary interests: *Re Repington, Wodehouse* v. *Scobell*, [1904] 1 Ch. 811.

"The covenant for further assurance in a deed is a covenant intended to give full effect and operation to the estate and interest conveyed by the deed. Where it is sought to extend the operation of a general covenant of that kind to the execution of an instrument which would bar a title in others which would continue but for the execution of the instrument sought to be executed, I have always understood that an express stipulation to that effect is necessary. . . . For that reason it has, so far as I know, never been considered that a covenant for further assurance implied, without regard to the other covenants in the deed, a covenant to levy a fine, or to suffer a recovery, or to surrender a copyhold. The utmost extent to which the Court has gone with reference to covenants for further assurance has been to extend their operation to that very estate and interest which are conveyed by the deed. If a tenant in tail conveys in fee simple upon a recital that he is entitled to the fee, and the instrument contains no covenant to suffer a recovery, or to levy a fine, the Court, finding an express contract which relates to an estate in fee, which is purported to be conveyed by the instruments, extends the operation of the covenant for further assurance so as to apply to the subject-matter of the grant, which it is in the power of the grantor to complete by an instrument, although that instrument may bar and conclude the title of other persons. . . . I can find no contract in this deed for enlarging the estate of the grantor to any extent; and I conceive that, unless there be words in the instrument which can show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the Court is not justified in resorting to its extraordinary jurisdiction for specific performance to compel the grantor to execute an assurance of a kind that was not, and could not, from the form of the instrument, be thought to be in his contemplation at the time when the grant by him was made:" per Stuart, V.-C., *Davis* v. *Tollemache* (1856), 2 Jur. N. S. 1181 at p. 1185; 28 L. T. O. S. 188.

Tenant in tail.

Dicta contrà.

Dicta can be found extending this doctrine, but they must be carefully confined to the cases before the Judges. Thus in the case of *King* v. *Jones* (1814), 5 Taunt. 418, affirmed *sub nom. Jones* v. *King* (1815), 4 M. & S. 188, which was an action by the heir of a purchaser for damages for breach of a covenant for further assurance contained in the conveyance of the land by a husband and wife, *who purported to convey the fee simple* to the purchaser, whose heir

was evicted by reason of the husband and wife not having levied a fine, though requested to do so by the purchaser, Heath, J., says at p. 427:—"Under this covenant the heir might call for further assurances, even to levy a fine; he certainly might have called for the removal of a judgment or other incumbrances."

Mr. Rawle's criticism.

But on this Mr. Rawle (Cov. p. 198) observes:—"It is conceived that this proposition must be taken with some qualification, depending either, first, on the scope of the other covenants in the deed, or secondly, on the nature of the estate conveyed. For . . . all the other covenants for title are either general, *i.e.*, extending to *all* paramount titles and incumbrances, or limited, extending only to defects of title or incumbrances created by the vendor. But the covenant for further assurance has in general the same form of expression, whether the other covenants which accompany it are general or limited; it is an undertaking that the vendor will execute such further assurance as may be deemed necessary by the purchaser. If the other covenants in the deed are general, if their breach will be caused by reason of an incumbrance not created by the vendor, then it is conceived that the proposition is correct, and that the purchaser may, instead of suing at law upon his other covenants, invoke the aid of equity to remove the incumbrance. But if the other covenants are limited and the purchaser would therefore be without remedy at law upon them by reason of the incumbrance not having been created by the vendor, it is obvious that the vendor cannot be compelled to remove an incumbrance which he had not covenanted against."

Nature of estate conveyed.

"So, too, the purchaser's right may depend on the nature of the estate conveyed. There is a class of cases (see *Clanrickard* v. *Sidney* (1616), Hob. 273; *Delmer* v. *M'Cabe* (1863), 14 Ir. C. L. R. 377) which decide that although the covenants for title may be general, yet, when the conveyance is but of a limited estate or interest, the covenants will themselves be restrained and limited to the estate conveyed. Under such circumstances it would be inequitable that the purchaser should, by virtue of a covenant for further assurance, require the conveyance to himself of any greater estate."

"It is obvious, therefore, that no more is meant than that where the covenants for title are not limited or restrained by [*sic*, *quaere* restricted to] either the acts of the vendor or the particular estate conveyed, the purchaser has a right, under the covenant for further assurance, to require the conveyance of a paramount title or the removal of an incumbrance; but where the other covenants are limited to the acts of the vendor, or restrained by any particular

estate, the purchaser will have no right under this covenant to require the conveyance of any other estate, or the removal of an incumbrance not created by the vendor."

Lord St. Leonards' remarks.

So Lord St. Leonards says:—"If the title prove bad, and *the defect can be supplied by the vendor*, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for valuable consideration:" Sugd. V. & P. (14th ed.), p. 612, citing *Taylor* v. *Debar* (1675), 1 Ch. Ca. 274; 2 Ch. Ca. 212; and *Seabourne* v. *Powell* (1686), 2 Vern. 11.

Mr. Rawle's criticism.

But on this passage Mr. Rawle remarks that "the language, unless carefully considered, might mislead;" that "it is undoubtedly correct if the covenant for further assurance is the only one in the deed, or if the other covenants are unlimited or general. But if the covenant for further assurance is, either expressly or by implication, limited or restrained by other covenants, or by the grant itself (*Davis* v. *Tollemache* (1856), 2 Jur. N. S. 1181; 28 L. T. O. S. 188), then the remark would seem to have rather too broad an application:" Rawle, Cov. 199, note (2), where it is also observed that *Taylor* v. *Debar* was clearly a case in which the conveyance of the after-acquired title was properly compellable, and that in *Seabourne* v. *Powell* there was not any covenant for further assurance.

What acts within the covenant.

Whether disentailing deed must be executed.

As a general rule it seems that a purchaser cannot require his vendor who was only tenant in tail to execute a disentailing deed: *Davis* v. *Tollemache* (1856), 2 Jur. N. S. 1181; but in *Edwards* v. *Applebee* (1765), 2 Bro. C. C. 652 n.; and in *Pye* v. *Daubuz* (1796), 3 Bro. C. C. 595 (neither of which cases was referred to in *Davis* v. *Tollemache*), the assignees in bankruptcy of the vendor, tenant in tail, were directed to convey the fee simple, though there seem to have been no special words in the covenant; in the latter case, however, it is stated that the vendor represented himself to be seised in fee. But in a case where a tenant in tail in remainder, who had enlarged such estate into a base fee, by a conveyance, which recited an agreement for the sale of all his estate and interest, right and title under the will, which created the entail, in the farm, granted, as to all his estate and interest, right and title under the said will in the said farm, the said farm to the purchaser in fee, and covenanted that he would execute every such disentailing and other assurance and do ever such other thing for further or more

perfectly assuring all or any of the said premises to the purchaser as by the purchaser should be reasonably required: it was held that the vendor, after the death of the tenant for life, was bound to enlarge the base fee into a fee simple by executing a new disentailing deed: *Bankes* v. *Small* (1887), 36 Ch. D. 716.

A., who had mortgaged the fee, leased the equity of redemption and assigned the rent reserved on the lease to B. by way of security, but did not convey to him any estate in the land. The assignment contained a covenant for further assurance. Lord Hardwicke, C., said:—"I think this covenant is, in equity, a covenant to make a mortgage:" *Ex parte Wills* (1790), 2 Cox, 233.

Duplicate conveyance.

It has been held that under a covenant for further assurance the covenantee can require the execution of a duplicate conveyance where he has handed over the original to a purchaser from him of part of the estate; Sugd. V. & P. (14th ed.), p. 613: *Napper* v. *Lord Allington* (1700), 1 Eq. Ca. Ab. 166, pl. 4, but this decision was reversed on rehearing on another point; Platt, Cov. 344, 345 a.

Covenant to produce deeds.

It seems doubtful whether the covenantor can be required to execute a covenant to produce title-deeds to the purchaser: *Fain* v. *Ayers* (1826), 2 Sim. & St. 533; reported differently 1 Russ. 259 n.; *Hallett* v. *Middleton* (1826), 1 Russ. 243 at pp. 256, 257; or to give fresh covenants for title: *Thornborough* v. *Monpenson* (1594), Cro. Eliz. 370; *Pudsey* v. *Newsam* (1603), Yelv. 44; *Coles* v. *Kinder* (1620), Cro. Jac. 571; *Lassels* v. *Catterton* (1670), 1 Mod. 67. There is a distinction "between mere agreements to convey by reasonable assurance, which are held to carry with them a right to covenants for title in the deed of conveyance, and a right to the insertion of those covenants in the deed of further assurance itself:" Rawle, 202; Sugd. V. & P. (14th ed.), p. 615.

Covenants for title.

Act must be necessary;

In a covenant to do all "reasonable acts" for further assurance, "a reasonable act means such an act as the law requires, and if it be an unnecessary act, it is not a reasonable act, or one which would be required by law:" per Wood, B., *Warn* v. *Bickford* (1821), 9 Pri. 43 at p. 51.

and practicable.

The act required must be practicable. As to illness, lunacy, or death of the covenantor, whereby the act required ceases to be reasonable or practicable, see *Anon.* (1582), Moore 124, pl. 270; *Pet and Cally's Case* (1589), 1 Leon. 304; *Nash* v. *Aston* (1682), T. Jo. 195; Skin. 42; Rawle, Cov. 197.

"As counsel shall advise."

If the covenant is to make "such further assurance as counsel shall advise;" the purchaser must tender the intended assurance to the covenantor: *Bennet's Case* (1582), Cro. Eliz. 9; *Higginbottom's*

Case (1592), 5 Rep. 19 b; and the purchaser himself, though learned in the law, cannot advise: *Rosewel's Case* (1592), 5 Rep. 19 b; and the counsel is the purchaser's counsel: *Higginbottom's Case* (1592), 5 Rep. 19 b.

Where time for performance is limited.

If there be by the covenant a time limited within which acts of further assurance are to be done, the purchaser must make request within the time named: *Nash* v. *Aston* (1682), T. Jo. 195; Skin. 42; it is sufficient if he makes a general request: *Pudsey* v. *Newsam* (1603), Yelv. 44; 1 Brownl. & G. 84; Moore, 682; even if the assurance is to be such as shall satisfy the purchaser's counsel: *Baker* v. *Bulstrode* (1674), 2 Lev. 95; T. Raym. 232; differently reported, 1 Mod. 104.

Original conveyance void.

Specific performance will be refused where the original conveyance itself is void: as if a man covenants to stand seised to the use of a mere stranger and to make further assurance: *Fursaker* or *Tursaker* v. *Robinson* (1717), Prec. Ch. 475; Gilb. Eq. R. 139; Abr. Eq. 123; Platt, Cov. 353.

Distinguished from estoppel.

The cases arising upon the covenant for further assurance must be distinguished from those which depend upon the rule, that if a man, having a defective title, purports to convey property for value, and afterwards acquires a good title, equity renders that good title available for supporting the conveyance.

A. and his wife mortgaged a lease, which was not vested in them, but in C., who afterwards made a lease to trustees for the wife. Such trustees were directed to make a new mortgage to the mortgagee: *Seabourne* v. *Powell* (1686), 2 Vern. 11.

Where copyholds were mortgaged to the plaintiff's testator as freeholds, the customary heir of the mortgagor was directed to surrender to the use of the plaintiff: *Spencer* v. *Boyes* (1798), 4 Ves. 370.

And where a person entitled to a contingent remainder conveyed that interest to secure a debt, and the remainder was afterwards destroyed, the grantor was made to convey a new interest, which he acquired under the will of another person: *Noel* v. *Bewley* (1829), 3 Sim. 103; but this decision was doubted in *Smith* v. *Osborne* (1857), 6. H. L. C. 375 at p. 392.

"These cases" (viz.: *Seabourne* v. *Powell* (1686), 2 Vern. 11; *Noel* v. *Bewley* (1829), 3 Sim. 103; and *Morse* v. *Faulkner* (1792), 1 Anst. 11; 3 Swanst. 429 n., in which case no relief was given), "seem to me to establish this, that if a man sells an estate (and the principle is just the same if he grants his lands in mortgage, or creates an annuity issuing out of them) and the title is afterwards

defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title: " per Sugden, C., *Jones* v. *Kearney* (1841), 1 Dru. & War. 134 at p. 159.

In *Smith* v. *Baker* (1842), 1 Y. & Coll. C. C. 223, A., supposing himself to be entitled to the fee simple of land, subject to his mother's life estate, conveyed it to trustees for the benefit of his creditors, with covenants for title and further assurance. In fact the mother was the owner in fee simple; but on her death the land descended to A., and it was held that he must assure the estate so acquired by him.

A. being entitled to one-ninth of a fund purported to assign one-sixth of the fund to B. Subsequently A. acquired another one-eighteenth. *Held,* that B. was entitled to the whole of A.'s one-sixth: *Re Hoffe's Estate Act, 1885* (1900), 82 L. T. 556.

CHAPTER XXXII.

COVENANTS IN RESTRAINT OF TRADE.

Restraints of Trade originally Void: Now Valid if Reasonable: Reasonable if Limited to Particular Business in Particular Area: And even if Area Unrestricted: Not to Trade with Covenantee's Customers: Unreasonable Covenant Valid so far as Reasonable, if Severable: Restraints Severed quâ Area, quâ Business, quâ Customers: Severance as regards Time: Benefit of Covenant is Assignable: How Distance Measured: Unreasonable Covenants: What amounts to a Breach.

All restraints of trade formerly void.

All covenants in restraint of trade, general or partial, were originally void. Thus in a case where the plaintiff sued on a bond with a condition not to practise the craft of a dyer in the town of B. for six months, Hull, J., said:—"The bond is void, for that the condition is contrary to the common law, and by God, if the plaintiff were here, he should go to prison until he paid a fine to the King:" Y. B. 2 Hen. V. (1414), 5 [B.], pl. 26; and *Colgate* v. *Bacheler* (1601), Cro. Eliz. 872, is another early authority to the same effect; but the rule was relaxed in the 18th century, and partial restraints were held valid, at any rate as soon as *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, whether because they were only partial, or because, being only partial, they were reasonable, is a question decided differently by Bowen, L.J., and Lord Macnaghten: and the law has now been definitely laid down in the House of Lords as follows:—

Reasonable restraints are now valid.

> "All restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions. Restraints of trade may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable that is

in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public:" per Lord Macnaghten, *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535 at p. 565.

Many of the earlier cases are considered and discussed in that case, and such of the earlier cases as decided that the covenant was void, can only be considered as authoritative, if and so far as consistent with the decision in that case.

Reasonableness of restraint for judge.

The question whether a covenant in restraint of trade is wider than is reasonably necessary to protect the covenantee is one for the judge, not for the jury: *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45.

Evidence of experts inadmissible.

The evidence of persons engaged in the particular trade "stating their views of the reasonableness of the restrictive clause" is inadmissible: per Lindley, M.R., *Haynes* v. *Doman*, [1899] 2 Ch. 13 at p. 24.

Restraint is reasonable if limited to particular trade in particular area.

If the restraint applies only to a particular trade in a limited area, it is *primâ facie* reasonable. The following covenants have been held to be reasonable:—

Trade.	Duration.	Area.	Authority.
Baker . .	5 years	In the parish	*Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181.
Linen-draper .	No limit	½ mile from shop	*Chesman* v. *Nainby* (1726), 2 Stra. 739, 2 Ld. Raym. 1456, affirmed 1 Bro. P. C. 234.
Tallyman . .	7 years	City of Westminster	*Colmer* v. *Clark* (1734), 7 Mod. 230; S. C. *sub. nom. Clerke* v. *Comer*, Cas. temp. Hardw. 53.
Surgeon . .	14 years	10 miles from Thetford	*Davis* v. *Mason* (1793), 5 T. R. 118.
Attorney . .	No limit	London and 150 miles thence	*Bunn* v. *Guy* (1803), 4 East, 190.
Rope-maker .	Vendor's life	To employ only purchasers to make rope	*Gale* v. *Reed* (1806), 8 East, 80.
Apothecary .	No limit	20 miles of Ailesbury	*Hayward* v. *Young* (1818), 2 Chitty, 407.
Coaching business	No limit	Between Reading and London	*Williams* v. *Williams* (1818), 2 Swanst. 253.

Trade.	Duration.	Area.	Authority.
Saddler's Ironmonger	14 years	Certain towns	*Homer* v. *Ashford* (1825), 3 Bing. 322.
Travelling-trunk makers	Covenantors' lives	Certain districts of England	*Wickens* v. *Evans* (1829), 3 Y. & J. 318.
Druggist . .	No limit	Taunton and 3 miles thereof	*Hitchcock* v. *Coker* (1837), 6 Ad. & E. 438.
Carriers . .	No limit	Between London and divers other towns	*Archer* v. *Marsh* (1837), 6 Ad. & E. 959.
Stage coach proprietors	While covenantee carried on business	Between Croydon and Charing Cross	*Leighton* v. *Wales* (1838), 3 M. & W. 545.
Cowkeeper or milkman	While in service and 2 years after	5 miles from Northampton Square	*Proctor* v. *Sargent* (1840), 2 M. & Gr. 20; 2 Sco. N. R. 289.
Atttorney . .	20 years	Great Britain	*Whittaker* v. *Howe* (1841), 3 Beav. 383.
Dentist . .	No limit	London	*Mallan* v. *May* (1843), 11 M. & W. 653.
Baker . . .	14 years	Within one mile of shop	*Rannie* v. *Irvine* (1844), 7 M. & Gr. 969.
Tailor . . .	No limit	20 miles from Standard on Cornhill	*Rolfe* v. *Rolfe* (1846), 15 Sim. 88.
Crown-glass maker	7 years	Not to serve any other person than covenantees	*Pilkington* v. *Scott* (1846), 15 M. & W. 657.
Perfumer, toyman and hair merchant	No limit	London and Westminster	*Price* v. *Green* (1847), 16 M. & W. 346.
Maker and seller of ginger beer	No limit	1 mile of former place of business	*Pemberton* v. *Vaughan* (1847), 10 Q. B. 87.
Surgeon . .	No limit	Macclesfield and 7 miles thereof	*Sainter* v. *Ferguson* (1849), 7 C. B. 716.
Surgeon . .	No limit	28 Dorset Crescent and 2½ miles thereof	*Atkyns* v. *Kinnier* (1850), 4 Exch. 776.
Butcher . .	No limit	5 miles	*Elves* v. *Crofts* (1850), 10 C. B. 241.
Wine and spirit merchant	No limit	Counties of Carnarvon, Anglesey and Merioneth	*Turner* v. *Evans* (1852), 2 D. M. & G. 740.

Trade.	Duration.	Area.	Authority.
Publishers' canvassing trade	No limit	London, Middlesex, Surrey, 150 miles from G.P.O., Dublin, Edinburgh, and 50 miles of either	*Tallis* v. *Tallis* (1853), 1 El. & B. 391.
General Merchant	No limit	District between Morwenstow, Newquay, Launceston and Bodmin	*Avery* v. *Langford* (1854), Kay, 663.
Solicitor and General Manager of Estates	21 years	Parish of T. and 21 miles thereof	*Dendy* v. *Henderson* (1855), 11 Exch. 194.
Milkman . . .	While in service and 2 years after	3 miles from Charles Street	*Benwell* v. *Inns* (1857), 24 Beav. 307.
Traveller in lace trade	No limit	Districts travelled by covenantor	*Mumford* v. *Gething* (1859), 7 C. B. N. S. 305.
Horsehair manufacturer	No limit	Within 200 miles of Birmingham	*Harms* v. *Parsons* (1862), 32 Beav. 328.
Manufacture or sale of productions now manufactured in covenantee's business	No limit	Europe	*Leather Cloth Co.* v. *Lorsont* (1869), L. R. 9 Eq. 345.
Surgeon . .	While covenantee or his assigns carried on business.	N. and 10 miles	*Graveley* v. *Barnard* (1874), L. R. 18 Eq. 518.
Surgeon . .	No limit	N. and within 10 miles thereof	*Palmer* v. *Mallet* (1887), 36 Ch. D. 411.
Sale of beer and malt liquors	2 years	100 miles of G.P.O. at Cardiff	*Rogers* v. *Maddocks* [1892], 3 Ch. 346.
Commercial traveller	12 years	Certain counties in Ireland	*Cussen* v. *O'Connor*, [1893] 32 L. R. Ir. 330.
Hay and straw merchant	12 months	United Kingdom	*Underwood & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300.
Hardware manufacturer	No limit	25 miles of covenantee's works	*Haynes* v. *Doman*, [1899] 2 Ch. 13.
Pneumatic tubes for transmission of parcels	5 years	Eastern Hemisphere	*Lamson Pneumatic Tube Co.* v. *Phillips* (1904), 91 L. T. 363.

Moreover, if the restriction applies only to a particular trade, it may be reasonable, even if the area is unrestricted.

General restriction of particular trade held reasonable.

Thus the following covenants, though unrestricted as regards area, have been held reasonable:—

Not to carry on the business of a carrier, except as assistant to covenantee: *Wallis* v. *Day* (1837), 2 M. & W. 273.

"Not to represent any other champagne house for two years, and not to establish myself nor to associate myself with other persons or houses in the champagne trade for ten years": *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351.

"Not for three years to enter any like or similar business, and not to start a business of that kind themselves:" *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.*, [1892] 3 Ch. 447.

Not for twenty-five years to engage in the business of a manufacturer of guns or ammunition: *Maxim-Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; S. C. *sub nom. Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535.

"Not during this engagement . . . to carry on or be engaged either directly or indirectly as principal, agent, servant, or otherwise in any trade, business, or calling . . . relating to goods of any description sold or manufactured by" the covenantees, "their successors and assigns": *William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451.

Not to trade with covenantee's customers is reasonable.

Similarly covenants not to trade with customers of the covenantee have been held reasonable.

Thus the following covenants have been upheld:—

Not during the term of a lease assigned to solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the shop: *Rannie* v. *Irvine* (1844), 7 Man. & G. 969.

Not after the expiration of articles directly or indirectly to interfere or intermeddle with or be concerned as attorney, agent or otherwise for any person who had already been the client or correspondent in business of the plaintiff, and not to act as partner, clerk or assistant to any such person: *Nicholls* v. *Stretton* (1847), 7 Beav. 42; 10 Q. B. 346.

Not to serve or interfere with any customer served or belonging at any time to the master: *Baines* v. *Geary* (1887), 35 Ch. D. 154.

But applies only to particular business.

"Not to call upon, or, directly or indirectly, solicit orders from, or in any way deal or transact business with," any one who had during the covenantor's employment been a customer of the covenantee. *Held*, to apply only to a business of a kind similar to that of covenantee and to be valid: *Mills* v. *Dunham*, [1891] 1 Ch. 576.

"Not to serve, or solicit, or in any way interfere with any of the customers who should at any time be served by, or then belonging to," the covenantee: *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q. B. 478.

Whether such a covenant can apply to future customers.

Whether a covenant not to solicit customers of a business, who were not customers thereof, at the time of the covenantor's employment, is good or not is doubtful: *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q. B. 478.

A covenant not to solicit customers of the business of the covenantee applies to his then existing business, and not to a business started by him elsewhere: *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q. B. 478.

Unreasonable covenant may be good so far as reasonable, if severable.

If the restraint imposed be, as a whole, unreasonable, as extending too far, as regards either (i.) the area over which it extends, or (ii.) the business to which it applies, it can, notwithstanding, be enforced, so far as it is reasonable, but the unreasonable provisions must be severable from those which are reasonable on the face of the instrument itself.

Severance must appear on face of instrument.

The Court will not enforce a single stipulation, so far as it is reasonable. Thus in *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520, an agreement "not to enter the service or employ of any other person . . . or carry on any business whatsoever within one mile of X. for two years" was held unreasonable, and the Court refused to sever the stipulation into a restraint as to the business carried on by the covenantee and a restraint as to other businesses, and to enforce it so far as related to the business carried on by the covenantee.

Severance not implied from proviso.

And such severance cannot be implied from a proviso: *Perls* v. *Saalfeld*, [1892] 2 Ch. 149, where a covenant by a servant not to accept another situation or establish himself in any business within fifteen miles of London without the covenantee's written consent for a period of three years was held unreasonable and void, notwithstanding a provision that such permission was not to be withheld if the situation sought or business established was not for the sale of the same class of goods as those sold by the covenantee.

Restraints held severable *quâ* area.

Restraints have been held severable, as regards area, in *Chesman* v. *Nainby* (1726), 2 Stra. 739; 2 Ld. Raym. 1456; 1 Bro. P. C. 234, where "the house then occupied" was severed from "any house to which he might remove": in *Mallan* v. *May* (1843), 11 M. & W. 653, where "London" was severed from "any town where the covenantee might have been practising:" in *Price* v. *Green* (1847), 16 M. & W. 346, where "London and Westminster" were severed

from "600 miles from the same respectively:" and in *E. Underwood & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300, where "the United Kingdom," was severed from "France, Belgium, Holland, and Canada."

Quâ business.

Restraints have been held severable, as regards businesses, in *Rogers* v. *Maddocks*, [1892] 3 Ch. 346, where "aerated waters" were severed from "malt liquors": and in *William Robinson & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, where "any business relating to goods of any description made or sold by the company" was severed from "any other business whatever."

Quâ customers.

And restraints have been held severable as regards customers of the covenantee, in *Nicholls* v. *Stretton* (1847), 7 Beav. 42; 10 Q. B. 346, where clients of the covenantee during the covenantor's employment were severed from clients of the covenantee after the ceasing thereof and from clients of his successors: and in *Baines* v. *Geary* (1887), 35 Ch. D. 154; and *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478, where customers served during the covenantor's employment were severed from those served by or belonging at any time to the covenantee, his successors or assigns.

Severance as regards duration.

There does not appear to be any case where there has been any severance as regards duration; but as regards duration "no case can be found in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was not restricted:" per Lindley, M.R., *Haynes* v. *Doman*, [1899] 2 Ch. 13 at p. 23; and see per Rigby, L.J., *Ibid.* at p. 22.

It will be seen from the table above that there was no limit of duration in many of the cases there stated, and there was no limit of duration in *Mills* v. *Dunham*, [1891] 1 Ch. 576.

How long unlimited covenant lasts.

It is said in *Davey* v. *Shannon* (1879), 4 Ex. D. 81, that an agreement unlimited in point of duration lasts during the joint lives of covenantor and covenantee; but it may be doubted whether this is correct; there seems to be no reason why it should not last for the life of the covenantor.

Restraint limited as to duration.

A restraint if limited as to duration is *primâ facie* reasonable, or at any rate "the burden lies on the covenantor of showing that it is unreasonable:" per Chitty, J., *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.*, [1892] 3 Ch. 447 at p. 451; but in the following cases restraints, though limited as to duration, were held unreasonable: *Ward* v. *Byrne* (1839), 5 M. & W. 548; *Hinde* v. *Gray* (1840), 1 Man. & G. 195; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671.

On the other hand, the following covenants, though restricted in area, business, or duration, have been held unreasonable: "not to practise as a surgeon dentist at or within 100 miles of York:" *Horner* v. *Graves* (1831), 7 Bing. 735; 5 M. & P. 768; "not to follow or be employed in the business of a coal merchant for nine months": *Ward* v. *Byrne* (1839), 5 M. & W. 548; "not during the continuance" of a term for which a brewery was demised "to carry on the business of a brewer or merchant or agent for the sale of ale, &c., in Sheffield or elsewhere, or in any other manner howsoever to be concerned in the said business:" *Hinde* v. *Gray* (1840), 1 Man. & G. 195; "not directly or indirectly to engage or employ himself in any other business or transact any business with any other person or persons for a term of ten years:" *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671; "not either solely or jointly with, or as manager or agent for, any other person or persons or company, directly or indirectly, carry on or be engaged or concerned or interested in the business of a cider merchant, manufacturing chemist, or cordial compounder:" *Dowden & Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45.

Covenants held unreasonable.

The benefit of covenants in restraint of trade is assignable with, and can be sued on by the covenantee's assignee of, the business: *Benwell* v. *Inns* (1857), 24 Beav. 307; *Baines* v. *Geary* (1887), 35 Ch. D. 154 at p. 159; but such covenants may be so framed as to be personal to the covenantee: *Davies* v. *Davies* (1887), 36 Ch. D. 359; and if entered into jointly with two persons, who have several interests, one alone can sue: *Palmer* v. *Mallet* (1887), 36 Ch. D. 411.

Benefit of covenant assignable.

A covenant "to retire from the partnership and so far as the law allows from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners," was held too vague to be enforced, and to be personal to the continuing partners, and one which could not be sued on by their assignees: *Davies* v. *Davies* (1887), 36 Ch. D. 359.

In measuring distance, where the covenant is not to carry on business within a certain distance, the measurement is to be made as the crow flies, and from the nearest point of the house, where the place from which the measurement is to be taken is a house: *Mouflet* v. *Cole* (1872), L. R. 8 Ex. 32, where all the previous cases are collected.

How distance measured.

Where A. covenanted with B. not to do, within a certain district for other persons, any work or act usually done by solicitors, it was held by Buckley, J., that writing and posting, outside the district, on

What amounts to a breach.

instructions given outside the district, by persons residing outside the district, solicitors' letters to persons residing within the district was a breach of the covenant: *Edmundson* v. *Render*, [1905] 2 Ch. 320, but *quaere* whether this case can be relied on as laying down a principle to be generally followed.

CHAPTER XXXIII.

COVENANTS TO SETTLE PROPERTY.

Covenant only affects Interest mentioned in Covenant and not a Different Interest: Covenants to Settle after Acquired Property: Covenant that One shall Settle binds that One only: Covenant that Both shall Settle binds Both: Covenant that Property shall be Settled binds Both: Agreement that Property shall be Settled binds Both: Agreement that One shall Settle binds that One only: Effect of Recitals: Life Interests and Income not bound: Annuities: Accumulations of Income: Property subject to Power: When Power Exercised: Power cannot be Exercised to Defeat Covenant: "Is now entitled" includes Reversionary Interests: Contingent Interests: Defeasible Interests: "Shall become entitled" means during Coverture when applied to Wife's Property; Secus as regards Husband's Property: Words of Future Acquisition require some Change of Interest: Vested Reversion not falling into Possession not Bound: Vested Reversion falling into Possession is Bound: Contingent Interest vesting in Possession is Bound: Contingent Interest vesting in Interest only not Bound: If there is no Change Property not Bound: Property to which Covenantor has no Title if acquired in Possession is Bound: If acquired in Reversion is Bound: If acquired in Contingency is probably Bound: Named Minimum Value: "At any one time": Successive Appointments of Several Sums: Effect of Married Women's Property Act: Property given with Direction not to Settle: Covenant to Settle severs Joint Tenancy: Infant's Covenant is Voidable, not Void: Covenant cannot be Enforced by Volunteers: Covenants to Leave by Will.

NOTWITHSTANDING the rule in equity, that a person who contracts to convey, mortgage, or sell property and afterwards acquires such a title as enables him to carry out his contract, is bound to do so: *Taylor* v. *Debar* (1675), 1 Ch. Ca. 274; S. C. *sub nom. Taylor* v. *Dabar*, 2 Ch. Ca. 212; *Seabourne* v. *Powell* (1686),

2 Vern. 11; *Morse* v. *Faulkner* (1792), 1 Anst. 11; 3 Swanst. 429, note; *Noel* v. *Bewley* (1829), 3 Sim. 103; *Jones* v. *Kearney* (1841), 1 Dr. & War. 134; *Smith* v. *Baker* (1842), 1 Y. & Coll. Ch. C. 223; *Re Hoffe's Estate Act, 1885*, (1900) 82 L. T. 556; it is a rule that—

Where covenantor acquires a different interest, it need not be settled.

> If A. covenants to settle a particular interest in property, and afterwards becomes entitled to a different interest in the same property, he is not bound to settle such different interest.

Thus A., being possessed of a lease for years, covenanted in a deed making a family provision that, if he should die during the continuance of the term of the lease, his executors should assign the residue of the term to B. A. afterwards purchased the reversion in fee and died. *Held*, that the covenant did not preclude A. from purchasing the reversion, and that his executors were not liable as for breach of the covenant: *Williamson* v. *Butterfield* (1800), 2 Bos. & P. 63.

A., being under her parents' marriage settlement tenant in tail in remainder of certain lands, expectant on the failure of issue male of her brother, agreed in her own marriage settlement, which recited the former, that, "in case she shall become entitled to any such estate, part, or share, as aforesaid," it should be conveyed to the uses of the settlement. The brother suffered a recovery and died intestate, whereupon she inherited one-fourth of the lands as one of his four co-heiresses. *Held*, that the covenant did not affect the fee simple so coming to her by descent: *Tayleur* v. *Dickenson* (1826), 1 Russ. 521.

A., being entitled under the will of B. to a contingent remainder in land, by settlement reciting his title, covenanted that when and so soon as "the said remainder" should become vested in him in possession, he would settle it. The lands were disentailed by tenants in tail under the prior limitations of the will, and ultimately came to A. by descent and devise from them. *Held*, that A.'s covenant did not affect the fee simple thus acquired by him, inasmuch as he never acquired a vested interest in the remainder under the will of B.: *Smith* v. *Osborne* (1857), 6 H. L. C. 375.

A fund was settled for children as their mother should appoint, and in default for them equally. Part was appointed to a son, who agreed to settle it "and all other his part, share and interest, as well vested as contingent" in the fund. *Held*, that the residue of

the fund, which was afterwards appointed by the mother to the son, was not bound by the covenant: *Childers* v. *Eardley* (1860), 28 Beav. 648.

A., being entitled to an interest under a will in certain funds, by her marriage settlement assigned "all the share to which she then was or might become entitled by accruer, survivorship or otherwise" in the specified funds. *Held*, that a share in the funds taken by her under the will of her father, who had become entitled thereto, was not affected by the settlement: *Parkinson* v. *Dashwood* (1861), 30 Beav. 49.

The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and "all other her share by survivorship or otherwise, and all her right, contingent, reversionary or other interest, possibility, claim, and demand therein." She afterwards became entitled to a further share by the death of a brother intestate. *Held*, that it was not included in the settlement: *Edwards* v. *Broughton* (1863), 32 Beav. 667.

The rule was applied to a case where the settlor was the only child entitled in default of appointment, and took the whole fund under an appointment to herself, and the settlement contained an actual assignment, and not only a covenant to settle: *Lovett* v. *Lovett*, [1898] 1 Ch. 82; and to a case where the covenant was to settle "all her half or other share and interest whatsoever:" *Re Maddy's Estate, Maddy* v. *Maddy*, [1901] 2 Ch. 820.

Covenants in marriage settlements to settle after acquired property.

Questions on the construction of covenants for the settlement of property, not specifically mentioned, most frequently arise on marriage settlements, which often contain covenants for the settlement of the present or after-acquired property of the wife, and such covenants take the form, either that the husband or wife, or both, shall settle such property, or that such property shall be settled.

Two questions therefore may arise for determination: (i.), who is bound by the covenant, and (ii.), what property is within the covenant.

With regard to the first question, viz.: who is bound by the covenant, it may be laid down that—

Covenant by one that he or she will settle binds that one only,

A covenant that the covenantor will settle only binds the party who enters into the covenant, but a covenant, though by one party only, that both will settle,

but that both will settle, or that property shall be settled, binds both.

or that property shall be settled, binds both, if both are parties to the deed.

"It is quite settled that a covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but that if the covenant be by both, then it does bind it:" per Romilly, M.R., *Coventry* v. *Coventry* (1863), 32 Beav. 612 at p. 614.

Husband's covenant does not bind separate estate.

A covenant by the husband only that he will settle does not bind the following property:—

(i.) Property to which the wife becomes entitled for her separate use: *Douglas* v. *Congreve* (1836), 1 Keen, 410 at p. 423; 6 L. J. N. S. Ch. 51; *Thornton* v. *Bright* (1836), 6 L. J. N. S. Ch. 121; *Travers* v. *Travers* (1840), 2 Beav. 179; *Drury* v. *Scott* (1840), 4 Y. & C. Ex. 264; *Hammond* v. *Hammond* (1854), 19 Beav. 29; *Grey* v. *Stuart* (1860), 2 Giff. 398; 30 L. J. Ch. 884; *Gataker* v. *Reynardson* (1865), 13 W. R. 487; 12 L. T. N. S. 134.

Reversionary property.

(ii.) Reversionary interests of the wife's which do not fall into possession during the coverture, so that the husband cannot reduce them into possession: *Young* v. *Smith* (1865), 35 Beav. 87; L. R. 1 Eq. 180.

Equitable choses in action.

(iii.) Equitable choses in action to which the wife becomes entitled in possession during the coverture, but which are not reduced into possession by the husband during the coverture.

Thus a husband covenanted to settle, when required, one moiety of the wife's reversionary interests under a will; after the death of the tenant for life, he reduced one moiety into possession, and gave a release for it, but never settled it; the other moiety remained with his consent standing in the names of the executors until he died, in the lifetime of the wife, having by his will given all his property to her; it was held that the wife was not bound to settle the moiety which had not been assigned by the executors. Stuart, V.-C., saying:—"There is nothing strong enough to defeat her title. There was no assignment upon any trust, no covenant by her, and the articles are merely executory, and are not binding upon her:" *Cramer* v. *Moore* (1855), 3 Sm. & G. 141; 3 W. R. 347; 25 L. T. O. S. 31; *Re Webb's Trusts* (1877), 46 L. J. Ch. 769.

Wife's covenant binds separate estate.

A covenant by the wife that she will settle binds property to which she becomes entitled for her separate use: *Tawney* v. *Ward* (1839), 1 Beav. 563 at p. 568; *Milford* v. *Peile* (1854), 17 Beav. 602; 2 W. R. 181, where the words were "all property which should come to her absolutely, and not bound by any trust or provision

otherwise than for her absolute use": *Re Allnutt, Pott* v. *Brassey* (1882), 22 Ch. D. 275; unless it be settled without power of anticipation, per Romilly, M.R., in *Coventry* v. *Coventry* (1863), 32 Beav. 612 at p. 614; or unless the husband's interest only in the wife's property is covenanted to be settled: *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462; or unless there is an exception of property "already settled to her separate use:" *Coventry* v. *Coventry* (1863), 32 Beav. 612; *Whitgreave* v. *Whitgreave* (1864), 33 Beav. 532; or an exception of property "otherwise settled:" *Kane* v. *Kane* (1880), 16 Ch. D. 207; *Re Berens' Trusts, Berens* v. *Benyon* (1888), 59 L. T. 626.

Unless restraint on anticipation,

or exception of property, settled to separate use,

or otherwise settled.

In *Re De Ros' Trusts, Hardwicke* v. *Wilmot* (1885), 31 Ch. D. 81, Kay, J., held that the wife was bound where there was a covenant by the husband that he and the wife would settle, and until settlement stand possessed of the property upon the trusts of the settlement, but the construction was assisted by the recital of an agreement that property devolving on the wife should be settled; and in *Re Haden, Coling* v. *Haden*, [1898] 2 Ch. 220, Stirling, J. held that the wife was bound by a covenant by the husband that her property should be settled.

Covenant by husband that wife would settle,

or that property should be settled.

Where the wife was an infant, and the settlement recited that it had been agreed that the property, both real and personal, should be settled, and that the husband should enter into the covenant therein mentioned, and the husband covenanted that, "in case the wife would voluntarily consent thereto, but not otherwise," he and she would settle. *Held*, that such consent applied to realty only, and that personalty must be settled even without her consent: *Re Daniel's Trust* (1853), 18 Beav. 309.

Where the words are words of agreement and not of covenant the following rule may be laid down—

> An agreement and declaration that both parties shall settle, or that property shall be settled is binding on both husband and wife; but an agreement and declaration that one party only shall settle, or concur with the other in settling property, does not bind the other party; and the operation of this rule is not affected by the addition of a covenant by one party only to settle or concur in settling the property.

Agreement that property shall be settled, binds both, but that one party shall settle binds that party only.

"It appears to me that in effect the words 'It is hereby further agreed and declared' operate thus: they operate to show that what

is comprised in the clause of which these words are the commencement is what all parties intend and agree shall be done, and whatever you find in the clause is agreed to be done by any given party it is an agreement that that party is to do it, but the party who is to do the thing is the person who is alone bound to perform that agreement:" per Kindersley, V.-C., *Ramsden* v. *Smith* (1854), 2 Drew. 298 at pp. 307 and 308.

"In all the cases of clauses in marriage settlements as to the settlement of future property, three distinct questions arise: And . . . all the cases turn upon one or more of these different questions, namely—Whose covenant is it? Who is bound? Who has entered into the covenants? The second is, having ascertained who has entered into the covenant—By whom is the act to be done? And the third—What is the property which is included in the covenant, and is to be affected by the act to be done? . . . Now I apprehend that, whenever the covenant or agreement is simply and in terms the covenant and agreement of the husband, the husband only is bound; and some of the cases decided turned upon that distinction. But where the covenant in terms is not a mere exclusive covenant of the husband, but is an agreement between all the parties, which agreement, being under seal, is in point of fact a covenant by all the parties, then it is not merely limited to a covenant by the husband, but all parties who have entered into that agreement are bound to perform it. . . . In this case . . . there is a special covenant on the part of the husband, but, as it appears to me, not superseding the effect of that which is the general covenant comprised in the general agreement among all the parties. But although that is a general agreement, and in that sense a covenant . . . it does not mean that every party to the deed has bound himself and made himself responsible for the act to be done, because, as may be very justly observed, . . . trustees are under no responsibility that they will do the act to be done; or that, if it is not done, they will make good what ought to have been done. But the meaning of it is that these words express what [it] is the intention and agreement of all parties shall be done by somebody, but not at all meaning to express by whom the act is to be done which the parties have agreed and intended shall be done:" per Kindersley, V.-C., *Townshend* v. *Harrowby* (1858), 27 L. J. N. S. Ch. 553 at p. 566; 4 Jur. N. S. 353; 6 W. R. 413; 31 L. T. O. S. 33.

Agreement between all parties.

In *Campbell* v. *Bainbridge* (1868), L. R. 6 Eq. 269, the words being "It is hereby declared and agreed, and the said (husband) doth covenant that" the property should be settled, Stuart, V.-C. (at

p. 273), said :—"It seems to me very clear that where the covenant is by the husband alone, the words previously inserted, that 'it is hereby declared and agreed,' amount only to a declaration and agreement that all parties are agreed that the husband shall covenant. But where it is declared and agreed—that is, by all the parties, including the wife—that property which may come to her for her separate use, free from the control of her husband, shall be settled, the case is clear. . . . I cannot read the words of this clause without seeing that her separate property and her separate agreement are a substantial and integral part of this clause, and that it is an agreement by all the parties, including the wife, that the wife should do something:" the V.-C. then distinguished *Ramsden* v. *Smith* (1854), 2 Drew. 298, and remarked that, in that case, Kindersley, V.-C., "rested his judgment upon this, that the person who alone, according to the terms of the clause was to do anything, was the husband."

Effect of agreement and declaration by parties.

"The rule is that where you have such words as 'it is hereby agreed and declared between and by the parties to these presents,' that some one will do an act, or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. . . . If we find that no act is to be done except by one of the parties, these words amount only to a covenant by that one party with the others:" per Jessel, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354 at p. 359.

Recitals do not restrict or extend the covenant if clear.

In cases falling under the first branch of the rule, a recital in general terms of an agreement "that the husband shall settle" the property, will not restrict the generality of the agreement in the operative part of the deed: *Willoughby* v. *Middleton* (1862), 2 J. & H. 344; 6 L. T. N. S. 814; and in cases falling under the latter branch of the rule a recital in general terms of an agreement that the property "shall be settled," will not enlarge a covenant by the husband in the operative part that "he will settle" it: *Hammond* v. *Hammond* (1854), 19 Beav. 29; *Young* v. *Smith* (1865), L. R. 1 Eq. 180; 35 Beav. 87; *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354; provided that in each case the operative words are unambiguous.

Agreement by both and covenant by husband that property shall be settled binds wife.

Where there was an agreement by all parties and a covenant by the husband alone that the property should be settled, the wife, after her husband's death, was held bound to settle a reversionary chose in action to which she became entitled during the coverture, but which did not fall into possession until after the husband's death: *Butcher* v. *Butcher* (1851), 14 Beav. 222; *Re*

D'Estampes, D'Estampes v. *Hankey* (1884), 32 W. R. 978, where the prior cases are reviewed, and *Reid* v. *Kenrick* (1855), 3 W. R. 530; 1 Jur. N. S. 897; 24 L. J. Ch. 503; 25 L. T. O. S. 193, stated *infra* p. 586, is distinguished; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87 at p. 93; and the wife was held bound to settle her separate property: *Willoughby* v. *Middleton* (1862), 2 J. & H. 344; 6 L. T. N. S. 814 (more fully stated per Lord Selborne, C., in *Codrington* v. *Lindsay* (1872), L. R. 8 Ch. 578 at p. 590); *Campbell* v. *Bainbridge* (1868), L. R. 6 Eq. 269; *Smith* v. *Lucas* (1881), 18 Ch. D. 531; and in *Caldwell* v. *Fellowes* (1870), L. R. 9 Eq. 410, James, V.-C., held that recitals that property should be settled, and that the husband should enter into a covenant for settling it, followed by a covenant by the husband alone that the property should be settled, and that he would settle it, operated to sever the joint tenancy of the wife in her freeholds.

Agreement, and covenant by husband that both shall settle binds both.

In *Stevens* v. *Van Voorst* (1853), 17 Beav. 305, it was agreed and declared between and by the parties, and the husband covenanted, that they the said husband and wife and each of them, would settle the wife's after-acquired property. *Held*, that this was a covenant by the wife as well as the husband [and therefore property acquired by her after her husband's death must be settled by her; which conclusion is not now law; *infra*, p. 590].

The decision in *Stevens* v. *Van Voorst* that the wife was bound is probably correct, as there was an agreement that the husband and wife would settle, and therefore the case is within the rule stated *supra* on p. 583, and it is consistent with *Re De Ros' Trusts, Hardwicke* v. *Wilmot* (1885), 31 Ch. D. 81, stated *supra*, p. 583; but in *Reid* v. *Kenrick* (1855), 1 Jur. N. S. 897; 24 L. J. Ch. 503; 3 W. R. 530; 25 L. T. O. S. 193, where the words were "It is hereby agreed and declared by and between the said parties hereto, and the said R. (husband), doth hereby covenant, that "the after-acquired property shall be and remain, and he the said R. will permit and suffer the same to be and remain upon the trusts of the settlement, and that he the said R. will pay, transfer, and deliver over, and join with the said (wife) in assigning, conveying, and assuring" such property, Stuart, V.-C., distinguished *Stevens* v. *Van Voorst* (1853), 17 Beav. 305, and held that it was impossible to say that, upon the construction of the instrument, there was any covenant on the part of the wife, and accordingly that a reversionary chose in action which fell into possession after the husband's death, was not bound. (*Sed quaere.* The terms of the settlement are peculiar, and seem to amount to an agreement by all parties, first,

that the property should be settled, and secondly, that the husband should settle it.)

But where there was an agreement and declaration, and a covenant by the husband only, that "he will settle, or concur with the wife in settling" the property, it was held that the wife was not bound to settle property given to her separate use: *Ramsden* v. *Smith* (1854), 2 Drew. 298; *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354.

Agreement, and covenant by husband that he will settle does not bind wife.

It was, however, held in *Lee* v. *Lee* (1876), 4 Ch. D. 175, by Jessel, M.R., that a covenant by a husband that he would settle a *specific property* belonging to his wife contained in an ante-nuptial agreement, to which the wife was a party, bound the wife.

Specific property.

With regard to the second question, viz. what property is within the covenant; the covenants in question sometimes refer to present as well as future property, and sometimes only to future property.

What property is bound.

Although such covenants usually relate to property of the wife, a man can covenant to settle all his after-acquired property of every description, "except business assets." Such a covenant was held good against creditors in *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, overruling *Ex parte Bolland, Re Clint* (1873), L. R. 17 Eq. 115.

Husband's property.

Such covenants, when relating to the wife's property, sometimes apply to the property, and sometimes only to the husband's interest in such property.

Husband's interest in wife's property.

The presumption is that the covenant does not extend to a life interest, or a life annuity, or to income.

Life interest or income is not bound.

In *Lewis* v. *Madocks* (1810), 17 Ves. 48, where the covenant was to settle the husband's after-acquired property, Lord Eldon, C. (at p. 55), said that he could not adopt the construction that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of the bond [except only to the extent to which the husband himself might think proper to lay up that produce as capital, as to which, however, see per Romer, J., *Finlay* v. *Darling*, [1897] 1 Ch. 719 at p. 722].

Husband's income and life interest.

In *White* v. *Briggs* (1848), 22 Beav. 176 n.; and in *St. Aubyn* v. *Humphreys* (1856), 22 Beav. 175, it was held that a life interest acquired by the husband, who had covenanted to settle his after-acquired property, was not bound by the covenant.

The rule was applied to income given to the wife for her separate use in *Duncan* v. *Cannan* (1855), 21 Beav. 307, in which case the

Wife's life interest.

life interest was for separate use with restraint in anticipation, but it was stated that the fact that it was so was immaterial.

In *Townshend* v. *Harrowby* (1857), 4 Jur. N. S. 353; 27 L. J. Ch. 553; 6 W. R. 413; 31 L. T. O. S. 33, it was held that life interests, whether for the wife's separate use or not, are not intended to be included so as to fall into the trust property as capital: *Fyfe* v. *Arbuthnot* (1857), 1 De G. & J. 406; but in *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462, where the wife became entitled to a life interest in leaseholds, with a proviso of forfeiture on alienation, Kindersley, V.-C., seems to have thought that the life interest was bound, since, though he inclined to think that an assignment on the trusts of the settlement would not be a forfeiture, he declined to order the wife to run the risk: this case is discussed by Chitty, J., in *Re Allnutt, Pott* v. *Brassey* (1882), 22 Ch. D. 275 at p. 280.

Life interest forfeitable on alienation.

In *Forster* v. *Davies* (1861), 4 De G. F. & J. 133, a life interest without power of anticipation was held not to be bound.

Annuity.

An annuity acquired by the wife was held not to be within the covenant in *Re Dowding's Settlement Trusts, Gregory* v. *Dowding*, [1904] 1 Ch. 441; and accumulations of income are not bound: *Finlay* v. *Darling*, [1897] 1 Ch. 719 (dissenting from *Re Bendy, Wallis* v. *Bendy*, [1895] 1 Ch. 109); *Re Clutterbuck's Settlement, Bloxam* v. *Clutterbuck*, [1905] 1 Ch. 200; and *Mackenzie* v. *Allardes*, [1905] A. C. 285, per Lord Davey at p. 296.

Accumulations of income.

Property subject to power of appointment is not bound.

Property over which the covenantor has merely a power of appointment is not bound by the covenant, unless expressly included therein: *Ewart* v. *Ewart* (1853), 11 Ha. 276; *Townshend* v. *Harrowby* (1858), 4 Jur. N. S. 353; 27 L. J. Ch. 553; 6 W. R. 413; 31 L. T. O. S. 33; *Bower* v. *Smith* (1871), L. R. 11 Eq. 279; 19 W. R. 399; 40 L. J. Ch. 194.

But appointed interests are bound.

But if the covenantor appoint to himself or herself an interest that falls within the covenant, such interest will be bound: *Ewart* v. *Ewart* (1853), 11 Ha. 276; and, if in default of appointment the property is given to the covenantor, the property is bound, and the covenantor cannot exercise the power so as to defeat the operation of the covenant: *Re O'Connell, Mawle* v. *Jagoe*, [1903] 2 Ch. 574; overruling *Re Gerard, Oliphant* v. *Gerard* (1888), 58 L. T. 800; and of course the covenant may be so worded as to include property

Power cannot be exercised to defeat the covenant.

over which the covenantor has a general power of appointment by deed: *Re Anstis, Chetwynd* v. *Morgan* (1886), 31 Ch. D. 596 at p. 604; but a covenant to exercise in favour of the trustees a general power exercisable by will only does not bind the property and cannot be specifically enforced; but damages can be given for the breach thereof, and if the power be exercised the appointed funds are assets for payment of such damages: *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510.

Power exercisable by will only.

Where the covenant includes property to which the covenantor "is now entitled," or "at the time of the marriage shall be entitled," all reversionary interests, whether vested or contingent, to which the covenantor is entitled at the date of the settlement or marriage, as the case may be, are bound.

Property to which covenantor "is now entitled" or "at date of marriage shall be entitled" includes reversionary interests.

The rule applies to a vested reversion: *Re Mackenzie's Settlement* (1867), L. R. 2 Ch. 345; *Caldwell* v. *Fellowes* (1870), L. R. 9 Eq. 410; *Davenport* v. *Marshall*, [1902] 1 Ch. 82. (*Dering* v. *Kynaston* (1868), L. R. 6 Eq. 210, which is *contrà*, cannot be supported: see per Malins, V.-C., *Agar* v. *George* (1876), 2 Ch. D. 706 at p. 709, and per Jessel, M.R., *Re Jackson's Will* (1879), 13 Ch. D. 189 at p. 196.)

Vested reversion.

The rule applies to a contingent interest, even if such interest does not fall into possession till after the termination of the coverture: per Turner, L.J., *Re Mackenzie's Settlement* (1867), L. R. 2 Ch. 345 at p. 348, where he says:—"The terms of the covenant are 'if she is, or if she becomes, entitled to property of the value of 400*l.* for any estate or interest whatsoever.' Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of a larger value, the covenant would not reach it?" *Agar* v. *George* (1876), 2 Ch. D. 706; and *Cornwell* v. *Keith* (1876), 3 Ch. D. 767, are authorities to the same effect.

Contingent interest.

The rule applies to a reversionary interest liable to be divested by the exercise of a power of appointment: *Re Jackson's Will* (1879), 13 Ch. D. 189; *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745; but if the reversionary interest is divested by the exercise of a power of appointment, and the property appointed absolutely to the wife after the termination of the coverture, the property is not within the covenant: *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745, overruling *Re Frowd's Settlement* (1864), 4 N. R. 54; 10 L. T. N. S. 367.

Defeasible interest.

Half-pay.

A covenant to settle "property" to which the settlor "is entitled" does not include the half pay of a lieutenant in the navy, which is not "strictly property of any kind or description, but only his chance of earning future wages:" *Churchill* v. *Denny* (1875), L. R. 20 Eq. 534.

Where the husband covenanted to settle the share of his wife and himself "in her right" under her grandfather's will, it was held that this meant property which the wife, but for the marriage, would have taken, and therefore an interest given to the husband himself was not bound: *Ibbetson* v. *Grote* (1858), 25 Beav. 17.

"Shall become entitled" means during coverture. *quâ* wife's property;

In the absence of special words, a covenant to settle property "to which the wife shall become entitled" will be construed to mean "shall become entitled during the coverture:" *Re Edwards* (1873), L. R. 9 Ch. 97, approving *Dickinson* v. *Dillwyn* (1869), L. R. 8 Eq. 546; and *Carter* v. *Carter* (1869), L. R. 8 Eq. 551; and overruling on this point *Stevens* v. *Van Voorst* (1853), 17 Beav. 305; even if the covenant relates only to property coming from a specific source: *Re Campbell's Policies* (1877), 6 Ch. D. 686.

even if from specific source.

Contrà quâ husband's property.

A similar covenant as to the husband's property is not so construed.

Wife's property.

"The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore, *primâ facie*, is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death:" per James, L.J., *Re Edwards* (1873), L. R. 9 Ch. 97 at p. 100.

"The arguments which have been addressed to me in favour of construing a clause like this to include property coming to the lady after the determination of the coverture, are not sufficient to induce the Court so to extend its operation. On the contrary, I think that such a construction would in all probability not carry out the intention of the parties. It might have the effect of rendering impossible any settlement upon the children of a second marriage, and of leaving them totally unprovided for. A settlement upon a first marriage having such operation would be in the highest degree improvident; for the lady might soon become a widow, and thus, if the covenant were held to extend over the whole period of her

life, all her fortune might go to the single child of a first marriage, to the entire exclusion of numerous children of a subsequent marriage:" per Hall, V.-C., *Re Campbell's Policies* (1877), 6 Ch. D. 686 at p. 690. *Re Coghlan, Broughton* v. *Broughton*, [1894] 3 Ch. 76, is to the same effect.

Husband's property.

In *Prebble* v. *Boghurst* (1818), 1 Swanst. 309, where the condition of a bond on marriage was "If the said (husband) should at any time during his natural life become seised," &c., the words were given their natural meaning, and land of which he became seised after the death of his wife was held to be bound; and in *Fisher* v. *Shirley* (1889), 43 Ch. D. 290, a covenant by the husband to settle his wife's property was held to include property which he acquired after her death.

Judicial separation.

A decree for judicial separation terminates the coverture so far as regards property devolving upon the wife after the date thereof as 20 & 21 Vict. (1857) c. 85, s. 25, enacts that "in every case of a judicial separation the wife shall from the date of the sentence, and while the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her:" *Dawes* v. *Creyke* (1885), 30 Ch. D. 500; *Davenport* v. *Marshall*, [1902] 1 Ch. 82.

Legacy saved from lapse by existence of children.

Where the covenant was for the settlement of property coming to or vesting in the wife or the husband in her right during the coverture, it was held that a legacy given to the wife by her father, which was saved, by her leaving issue, from lapse on her death in his lifetime, was not bound by the covenant: *Pearce* v. *Graham* (1863), 11 W. R. 415; 32 L. J. Ch. 359.

Spes successionis.

And a mere *spes successionis*, such as her hope of succession to a share of her husband's personal estate under the Scots Law, is not bound by the covenant: *Re Simpson, Simpson* v. *Simpson*, [1904] 1 Ch. 1.

What property is within words descriptive of future acquisition only.

Where the words of the covenant apply only to "property to which the wife shall become entitled," they clearly do not bind property to which the covenanting party is already entitled in possession; and they clearly do bind property which the wife acquires in immediate possession during the coverture, and to which she had no title of any kind at the date of the marriage.

But greater difficulty arises in applying words of future acquisition to property in which the wife has already, at the time of the marriage, a reversionary interest which vests in possession, or a contingent interest which vests in interest only, during the coverture, and the governing principle of the cases seems to be that, in

order to satisfy words of future acquisition, there must be, after the marriage and during the coverture, some change of title, or fresh acquisition of interest in the property in question.

There must be some *change* in title during coverture.

"The law on this subject is in a very embarrassing state, and the decisions are in fact irreconcilable. . . . It must be taken as clear on principle and authority, that such a covenant, where the words are future, does not affect present property. The judgment of James, V.-C., in *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 585, represents, I conceive, quite accurately the law as deduced from the cases cited before him. There can be no doubt that a covenant like the present applies exclusively to interests which the parties may acquire a title to after marriage, distinct from those vested in them at the time of marriage, and that there must be some change or other in the title to the property after marriage in order to bring it within the covenant. This change is described in the covenant by the words 'become entitled to.' The expression 'become entitled to,' in these and most covenants of the sort, applies, I conceive, only to an acquisition of interest by the wife; and this may mean (i.) an acquisition of property in which the wife had no interest at the time of the marriage, and which vests in her absolutely during the coverture; or (ii.) an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture; or (iii.) an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant; the difficulty arises with regard to the other two classes. Both of them cannot be included within the covenant, and the question is, which of them is, *primâ facie*, to be considered as so included:" per Wickens, V.-C., *Re Clinton's Trust* (1872), L. R. 13 Eq. 295 at p. 304.

"Become entitled to."

Enumeration of titles.

The titles, therefore, which may be acquired after the date of the marriage and during the coverture are:—(i.) Acquisition in possession of property to which the wife had a title in reversion, vested or contingent, at the date of the marriage; (ii.) The vesting in interest, but not in possession, of property, in which she had a contingent interest at that date; (iii.) Acquisition in possession of property, in which she had no interest at that date; and (iv.) Acquisition of a reversionary title (vested or contingent) to property, in which she had no interest at that date. These different classes of acquisition of title are discussed hereafter, but the cases in which there has been no change of title are first considered.

Property to which the wife is entitled in possession at the date of the marriage is not bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition by the wife only.

Property of wife in possession at date of settlement is not bound.

Thus property to which the wife was entitled in possession was not bound by a covenant to settle "such personal estate as shall become vested in or accrue to her:" *Hoare* v. *Hornby* (1843), 2 Y. & C. C. C. 121; or "all and singular the personal estate to which the said (*wife*) shall at any time or times become entitled:" *Otter* v. *Melvill* (1848), 2 De. G. & Sm. 257; or "all and every the estate and effects, of what nature and kind soever, whether real or personal, to which the said (*wife*) at any time during the said intended coverture shall become seised, possessed of, or entitled unto:" *Wilton* v. *Colvin* (1856), 3 Drew. 617; 25 L. J. Ch. 850.

Half-pay.

By a marriage settlement it was agreed that A., the husband, and all other necessary parties, should settle all property to which "he now is, or shall, during the intended coverture become entitled." At the time of his marriage he was in receipt of half-pay as a naval officer: but afterwards, during the coverture, he commuted it and received the commutation money. *Held*, that the commutation money was not bound by the covenant; for the half-pay was not strictly "property," nor was it (at law) assignable property; and therefore it did not fall within the words of the covenant; and the fact of commuting, *i.e.*, selling it, did not make a new acquisition of title to the commutation money: *Churchill* v. *Denny* (1875), L. R. 20 Eq. 534.

Proceeds of sale of half-pay.

On the second marriage of B., a widow, she executed with the consent of J., her intended husband, a deed settling certain specified property. By an agreement dated the same day, reciting the settlement, and that the parties had agreed that any property which B. "may be entitled to," other than that included in the settlement, "should be settled" upon similar trusts, B. and J. covenanted "each with the other" that in case B. "shall be entitled" to any property other than that comprised in the settlement, "the same shall be settled." *Held*, that the agreement applied only to property to which B. might afterwards become entitled, and not to any property to which she was entitled at the date of the agreement, but which was not included in the settlement: *Re Blockley, Blockley* v. *Blockley* (1884), 49 L. T. 805; 32 W. R. 385.

And where the wife was entitled in possession to a share of residue,

in respect of which she had, prior to the marriage, given a release, but such release was subsequently to the marriage set aside, and thereupon further sums were received by her in respect of her share it was held (reversing Kay, J.), that the additional residuary property thus recovered could not be treated as having fallen into possession when the release was set aside, and was consequently not bound by a covenant to settle property acquired subsequently to the marriage: *Re Garnett, Robinson* v. *Gandy* (1886), 33 Ch. D. 300.

Husband's acquisition of interest in wife's property.

But if the husband acquires an interest on the marriage his acquisition is a sufficient future acquisition to fulfil the words of the covenant, where the covenant extends to property acquired by him, and binds him to settle it: *Williams* v. *Mercier* (1884), 10 Ap. Ca. 1.

In *James* v. *Durant* (1839) 2 Beav. 177, S. C. *sub nom. James* v. *James*, 9 L. J. N. S. Ch. 85, the words were: "In case the *wife* or any person or persons in trust for her or the *husband* in her right should at any time or times thereafter during their joint lives, become possessed of, interested in, or entitled to, any sum or sums of money or other personal property, estate or effects whatsoever." It was held that personalty to which the wife was entitled in possession at the date of the marriage was bound, on the ground (following the reasoning in *Grafftey* v. *Humpage* (1838), 1 Beav. 46; on app. 3 Jur. 622) that by the marriage the husband acquired, in his wife's right, title to the property in question. It appears from the report of *James* v. *James* in the Law Journal that the wife, for herself, &c., and the husband, for himself, &c., covenanted that in case the wife "or the husband *in her right* should at any time or times *thereafter* during their joint lives become," &c. Lord Langdale, M.R., said that the words "at any time or times *thereafter*" could only be construed to mean "at any time or times after the execution of the settlement;" and by virtue of the marriage and in right of his wife the husband acquired the title to the property in question. This case was followed in *Re Viant's Settlement Trusts* (1874), L. R. 18 Eq. 436, where Bacon, V.-C., decided that where the covenant was to settle property "to which the wife or the husband in her right should during the coverture become entitled" the words of futurity were satisfied by the interest that the husband acquired by the marriage; and in *Hamilton* v. *James* (1877), Ir. R. 11 Eq. 223, which decided that a sum of money lent to the husband by the wife before the marriage was bound by a covenant to settle personalty to which the wife or the husband in her right should become entitled; and, although disapproved in other cases, was re-established by the judgment of the House of Lords in *Williams* v. *Mercier* (1884),

10 Ap. Ca. 1, where, there being an agreement and declaration in a marriage settlement that all real and personal property to which the wife or the husband in her right at any time during the coverture should become entitled (except jewels which should belong to the wife for her separate use), should be settled, it was held, that personalty which was vested in possession in the wife at the date of the marriage (1881), and consequently became the property of the husband by reason of the marriage, was included in the covenant, and therefore that jewels then belonging to the wife were within the exception, and belonged to her for her separate use.

Cases *contra.*

Where the covenant was by the husband and wife, and the words were :—"All such further or other portion or personal estate (if any) as shall during the life of the said (*wife*) become vested in or accrue to her, or as shall or may be assignable by the said (*husband*) and (*wife*) or either of them in law or equity, either for a vested or contingent interest:" *Hoare* v. *Hornby* (1843), 2 Y. & C. C. C. 121; "if at any time or times during the said intended coverture the said (*husband* and *wife*) or either of them in her right, shall, by gift, descent, succession, or otherwise, become entitled to any real or personal estate:" *Archer* v. *Kelly* (1860), 1 Dr. & Sm. 300; 29 L. J. Ch. 911; "any personal estate should devolve to or vest in the wife or to or in the husband in her right": *Churchill* v. *Shepherd* (1863), 33 Beav. 107; "all and singular the moneys, stocks, goods and chattels, and other personal estate which at any time or times during the said intended marriage" the *wife* or the *husband* in her right "shall become possessed of, or entitled to, by transmission, gift or otherwise, and whether in possession or expectancy:" *Re Browne's Will* (1868), L. R. 7 Eq. 231 (at p. 232); "in case any personal property shall at any time or times during the said intended coverture be given or bequeathed to, or in any manner vest in" the *wife* or the *husband* in her right: *Ibid.* at p. 233; it was held that property to which the wife was at the date of the settlement entitled in possession was not bound; but it is doubtful how far these cases can stand after the decision in *Williams* v. *Mercier* (1884), 10 Ap. Ca. 1.

Vested reversion, not falling into possession during coverture is not bound.

Property to which the wife is entitled in remainder or reversion at the date of the marriage, but which does not fall into possession until after the determination of the coverture, is not bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition by the wife only; but it

may be doubted whether the acquisition of it, if personalty, by the husband on the marriage is not a sufficient future acquisition of it by him, if the covenant extends to property acquired by him.

The rule was applied to a post-nuptial settlement in *Wyndham's Trusts* (1865), L. R. 1 Eq. 290, where the husband covenanted that "all real and personal estate and effects which shall or may at any time *hereafter during the joint lives* of the husband and wife *descend*, devolve upon, or be given, devised, or bequeathed to, or in trust for her," should be for her separate use: Wood, V.-C. distinguishing *Grafftey* v. *Humpage* (1838), 1 Beav. 46; on app. 3 Jur. 622.

In *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 585, James, V.-C., applied the rule to a vested remainder in real estate, which did not fall into possession till after the termination of the coverture. He says: "The words of the covenant are words of futurity: 'shall during the coverture become seised or possessed of or entitled to;' and I find nothing to warrant a departure from the literal and natural meaning of the words. This is not property with regard to which it can be averred that the husband or wife did become 'seised or possessed of or entitled to' it 'during the coverture.' No seisin, no title accrued to either of them in respect of it during the coverture; hence the property does not satisfy the words of futurity in the covenant, and consequently was not included within it." *Re Clinton's Trust* (1872), L. R. 13 Eq. 295, per Wickens, V.-C., is to the same effect.

Whether husband's acquisition of interest is sufficient.

Where the reversionary interest is personalty, the change of interest caused by the marriage, which gives an inchoate interest in the property to the husband, is sufficient to satisfy the words "becoming entitled, &c.;" and accordingly property of this description is bound, whether it fell into possession after the death of the wife only, *Grafftey* v. *Humpage* (1838), 1 Beav. 46; on app. 3 Jur. 622; *Re Viant's Settlement Trusts* (1874), L. R. 18 Eq. 436; or after the deaths of both husband and wife: *Re Hughes' Trust* (1863), 4 Giff. 432.

These cases were disapproved by Jessel, M.R., in *Re Jones' Will* (1876), 2 Ch. D. 362, where the wife was at the date of the marriage entitled to a reversionary interest in personalty which did not fall into possession till after her death, and it was held it was not bound by the covenant. "The covenant provides that any property shall be settled to which the wife, or her husband in her right, should at any time or times during the coverture become

beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from a particular source. Inasmuch as the tenant for life outlived the wife, it is clear that *she* did not, nor did her husband in her right, during the coverture become entitled in possession to a fund which was hers in reversion before the marriage took place. It is equally clear that the husband, during the coverture, did not become entitled in right of his wife. His title accrued, not during the coverture, but afterwards, when he took out administration to his wife's estate. The sort of inchoate title that he had during the coverture, depending on the possibility of the property falling into possession during the coverture, really amounts to no title at all. Property such as this is not property to which the husband or the wife 'became entitled during the coverture:'" per Jessel, M.R., *Re Jones' Will* (1876), 2 Ch. D. 362.

But since the case of *Re Jones' Will*, the decision in *Williams* v. *Mercier* (1884), 10 Ap. Ca. 1 (*supra* pp. 594, 595), has to be considered.

Specific property.

By an ante-nuptial agreement, not under seal, signed by the intending husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate, which was subject to their life interests, and to the appointment of them and the survivor of them, to the wife; and the husband agreed that "he will settle such share as the wife may take in her father and mother's marriage settlement either by appointment or in default of appointment." The wife's father, having survived her mother, released the power and granted the estate after his death, giving the wife a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement. *Held*, that the property in question was bound, as being specifically described, and because the wife, having been a party to the agreement, thereby assented to the property being settled in a particular way: *Lee* v. *Lee* (1876), 4 Ch. D. 175.

Vested reversion falling into possession during coverture is bound.

Property to which the wife is entitled in remainder or reversion at the date of the marriage, and which falls into possession during the coverture, is bound by the covenant, where the subject-matter of the covenant is described by words applicable to future acquisition only.

The rule was applied where the words were:—"All the property

of what nature or kind soever to which the *wife* shall during the coverture become entitled:" *Blythe* v. *Granville* (1842), 13 Sim. 190; "in case, at any time or times hereafter during the coverture, any real or personal property and effects, of what nature or kind soever, shall descend, come to, or vest in, the *wife* or the *husband* in her right at law or in equity:" *Ex parte Blake* (1853), 16 Beav. 463; "all such real and personal estate as, at any time during the said intended coverture, the *wife* or the *husband* in her right shall become entitled to, by descent, transmission, claim, devise, bequest, gift, donation, representation, purchase, or otherwise:" *Bradford* v. *Romney* (1862), 30 Beav. 431; "if at any time during the life of the *wife*, any real or personal estate should be given or devised, descend, or devolve, be bequeathed, or come to her or to the *husband* in her right:" *Spring* v. *Pride* (1864), 4 De G. J. & S. 395; "if at any time or times after the solemnization of the said intended marriage, and during the joint lives of the *husband* and *wife*, they or either of them in her right shall by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects:" *Re Clinton's Trust* (1872), L. R. 13 Eq. 295. *Re Bland's Settlement, Bland* v. *Perkin*, [1905] 1 Ch. 4, is *contrà*, but in that case there was a proviso that reversionary interests which became subject to the covenant were not to be sold without the consent of the husband and wife, and Kekewich, J., held that, since those words pointed to reversionary interests to which the title in reversion first accrued during the marriage being subject to the covenant and the covenant therefore applying to acquisition of interest, it could not also apply to acquisition of possession, following the *dictum* of Wickens, V.-C., in *Re Clinton's Trust* (1872), L. R. 13 Eq. 295 at p. 305; but *quaere* whether this decision is correct.

Contingent interest vesting in possession during coverture is bound.

Property in which the wife has a contingent interest at the date of the marriage, and which falls into possession during the coverture, is bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition only.

Where the wife is entitled to a contingent interest at the time of the marriage, one of three events may happen—

(i.) The property may vest both in interest and possession during the coverture.

(ii.) The property may vest in interest but not in possession during the coverture; or

(iii.) The property may not vest in interest or in possession during the coverture.

In the first case, the property, when described by words of future acquisition, will be bound, and in the second and third cases it will not be bound, by the covenant.

Case i. Vesting in interest and possession.

Accordingly, where the wife was at the date of the marriage entitled to a contingent interest in real estate: *Archer* v. *Kelly* (1860), 1 Dr. & Sm. 300; or in real and personal estate: *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462; or in personalty: *Re Worsley's Trusts* (1867), 16 L. T. 826; the property, having fallen into possession during the coverture, was held to be bound by the covenant.

Case ii. Vesting in interest only.

The only case on the second head is *Re Michell's Trusts* (1878), 9 Ch. D. 5, where it is said by Jessel, M.R. (at p. 10), "The husband was not able to settle it during the coverture. He could not dispose of it by any means, nor could he and his wife together do so; it was not disposable; it was not property which could be effectually settled." It should be observed that the instrument under which the wife took the reversionary interest was dated in 1825, so that the interest was not alienable by the married woman under Malins' Act (20 & 21 Vict. (1857) c. 57), and, if the only reasons for the decision were those given by the Master of the Rolls, a different decision might be given in a case falling under Malins' Act, or the Married Women's Property Act, 1882. But Cotton, L.J., gives another reason, saying that the object of the covenant is to prevent the husband taking the property absolutely, and to bind it for the benefit of the wife and children; and probably in cases falling under Malins' Act it would be held that, though the wife would not be bound to convey the property, while it was reversionary, to the trustees of the settlement, she would not be allowed to convey the property, while it was reversionary, to anyone else, in such a manner as to prevent the property from being transferred to the trustees on its falling into possession during the coverture.

Case iii. Not vesting in interest.

Where the contingent interest did not vest either in interest or in possession during the coverture, it was held not to be bound: *Atcherley* v. *Du Moulin* (1855), 2 K. & J. 186, where Wood, V.-C., said at p. 193: "The word 'entitled' might be large enough to include a contingent interest, if the other words of the settlement showed that it was intended to have that effect; but when I find the words are that whatever she should 'be or become entitled to during her coverture' is to be vested in the trustees . . . it is

impossible to say that such a provision comprises anything more or other than what should so become her property as to admit of being dealt with upon the trusts of the settlement. It is very questionable whether such a covenant would comprehend even a reversionary interest. Certainly this contingent possibility is not within the words or spirit of the settlement."

Property acquired in possession during coverture to which the wife had no title at date of marriage is bound.

Property to which the covenantor has no title of any kind at the date of the marriage, but which is acquired in possession during coverture, is bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition only: per Wickens, V.-C., *Re Clinton's Trust* (1872), L. R. 13 Eq. 295 at p. 305; but property acquired on a mere change of investment is not within the covenant, nor are accumulations of income.

Change of investment.

"If a man has something to sell, and he sells it and gets the purchase-money, he does not acquire a future title, for it is his title to the property which enables him to get the money for it or to vary the investment, and varying an investment is not acquiring a title:" per Jessel, M.R., *Churchill* v. *Denny* (1875), L. R. 20 Eq. 534 at p. 536. Thus the commutation money paid to an officer in the navy in respect of his half-pay is not property to which he becomes entitled on the commutation, being only the purchase-money of the half-pay which he already owns: *Churchill* v. *Denny* (1875), L. R. 20 Eq. 534.

Where property which is expressly excepted from the settlement is sold and invested in other property, such property does not fall within the covenant: *Finlay* v. *Darling*, [1897] 1 Ch. 719 at p. 723, *Re Dowding's Settlement, Gregory* v. *Dowding*, [1904] 1 Ch. 441 at p. 446; *Re Clutterbuck's Settlement, Bloxam* v. *Clutterbuck*, [1905] 1 Ch. 200 at p. 204; overruling *Re Bendy, Wallis* v. *Bendy*, [1895] 1 Ch. 109.

Accumulations of income.

Accumulations of income are not bound, see *supra*, p. 588.

Specific chattels.

Covenant to settle "any real or personal estate and effects" on trusts for sale and investment. *Held*, that no exception could be implied of any specific chattels: *Willoughby* v. *Middleton* (1862), 2 J. & H. 344.

But in *Coles* v. *Coles*, [1901] 1 Ch. 711, where the wife had assigned to the trustees all her property, present and expectant or

future, Joyce, J. held that she was not bound to settle a sum of 280*l.* given her long afterwards by her husband.

Joint tenancy.

It has been held that property given to the husband and wife as joint tenants in fee was not within a covenant by the husband and wife to settle property which they or either of them in her right should become entitled to, but this was helped by a recital: *Edye* v. *Addison* (1863), 1 H. & M. 781; 12 W. R. 97.

Estate tail.

In *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200, it was held by Pearson, J., that the wife was not bound to assign an estate tail in possession in real estate to which she became entitled during the coverture; but it may be doubted whether this decision is correct.

Reversionary interest acquired during coverture is bound.

Property to which the wife has no title at the date of the marriage, and which she acquires in remainder or reversion during the coverture, even if it does not fall into possession till after the termination of the coverture, is bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition only.

Covenant by the husband only, to settle "all the estate, property and effects to which the *wife* or the *husband* in her right shall at any time or times during the intended coverture become seised or possessed of or entitled to, either at law or in equity under any gift, devise, or bequest in her favour by or on the part of her father." *Held* to bind a remainder given to the wife by her father's will: *Hughes* v. *Young* (1862), 32 L. J. Ch. 137; 1 N. R. 166; 9 Jur. N. S. 376.

Agreement and declaration and covenant by the husband only that "in case any personal estate, effects and property shall at any time or times hereafter during the intended coverture come to or vest in the *wife* or in the *husband* in her right," such property should be settled. *Held* to bind a remainder: *Butcher* v. *Butcher* (1851), 14 Beav. 222.

In *Townshend* v. *Harrowby* (1858), 4 Jur. N. S. 353; 27 L. J. Ch. 553; 6 W. R. 413, it was held on the words of the settlement that the remainder would or would not be bound according as the husband or wife survived: *Dickinson* v. *Dillwyn* (1869), L. R. 8 Eq. 546; *Cowper Smith* v. *Anstey*, W. N. 1877, p. 28.

Defeasible reversion.

A reversionary interest liable to be divested by a power of appointment is bound by the covenant: *Re Ware, Cumberlege* v. *Cumberlege-Ware* (1890), 45 Ch. D. 269.

Contingent interest acquired during coverture.

There is no decision as to the effect of a covenant describing the property by words of future acquisition only on property a contingent interest in which first accrues to the wife during the coverture; it appears to satisfy the words "shall become entitled:" *Re Mackenzie's Settlement* (1867), L. R. 2 Ch. 345; *Agar* v. *George* (1876), 2 Ch. D. 706; *Cornmell* v. *Keith* (1876), 3 Ch. D. 767; though possibly the reasoning in *Re Michell's Trusts* (1878), 9 Ch. D. 5, *supra* p. 599, might be followed.

Named minimum value, refers to value of property not of reversion.

Where only property of a named minimum value is to be settled, and the wife's interest is reversionary, the sum named means the value of the property itself when it falls into possession, not the value of the reversion when acquired.

This is decided in *Re Mackenzie's Settlement* (1867), L. R. 2 Ch. 345; *Re Clinton's Trust* (1871), L. R. 13 Eq. 295 (where Wickens, V.-C., says (at p. 306), "The property to be acquired is to be 'of the value' of 100*l.* or upwards. That seems to me to mean the actual value, and not the estimated value of a remainder acquired during coverture, and not falling into possession till many years afterwards"); and *Cornmell* v. *Keith* (1876), 3 Ch. D. 767 at p. 771.

Amount left in blank.

Where the amount is left in blank, there is not such uncertainty as to render the covenant void, Lord Cranworth, C., being of opinion that the covenant extended to all capital, but not to income to which the settlor should become entitled: *Fyfe* v. *Arbuthnot* (1857) 1 De G. & J. 406; 26 L. J. Ch. 646.

Duties are to be deducted.

Where the amount received by the wife is subject to legacy duties, the value is what the wife receives, not what the testator gives, the duty being deducted before arriving at the value: *Re Pares, Re Scott-Chad, Scott-Chad* v. *Pares*, [1901] 1 Ch. 708; but where the covenantor had received before and since the marriage sums by way of advancement, it was held by Malins, V.-C., that though the balance receivable was less than the stipulated amount, it was bound by the covenant: *Hood* v. *Franklin* (1873), L. R. 16 Eq. 496.

"At any one time."

Where the wife was entitled at the date of the settlement to two different reversions which fell into possession at the same instant, it was held that, in estimating the value for the purpose of the covenant, the aggregate value of the two shares, and not the value of each share separately, must be taken: *Re Mackenzie's Settlement*

(1867), L. R. 2 Ch. 345. But in *Hood* v. *Franklin* (1873), L. R. 16 Eq. 496, it was held (following *Re Hooper's Trust* (1865), 13 W. R. 710; 11 Jur. N. S. 479) that the words "at any one time," implied "from one and the same source." In neither of these cases had the wife any interest in either fund at the date of the settlement.

Where the wife was entitled under a will to an immediate legacy, and also to another legacy to be paid out of the proceeds of certain real estate, it was held that she was entitled to them both "at one and the same time and from one and the same source:" *Re Pares, Re Scott-Chad, Scott-Chad* v. *Pares*, [1901] 1 Ch. 708; but *Re Middleton's Will* (1868), 16 W. R. 1107, and *Re Davies, Harrison* v. *Davis*, [1897] 2 Ch. 204 (a case on sect. 7 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93)), are *contrà*.

Successive appointments of several sums.

Where the wife took under several appointments made by herself on the same day in exercise of the same power, and the amount appointed by each deed was less than, though the aggregate sum exceeded, the minimum, it was held that the property was not bound: *Bower* v. *Smith* (1871), L. R. 11 Eq. 279 (this report is incorrect); 19 W. R. 399; *Re Gerard, Oliphant* v. *Gerard* (1888), 58 L. T. 800.

Increase of value after coverture determined.

Covenant for settlement of wife's after-acquired property of the minimum value of 500*l*. Prior to the date of the settlement, a bequest had been made to trustees of an annuity, to be applied wholly or partly for the testator's widow, the surplus to be accumulated and divided at her death among the testator's children, one of whom was the intended wife. The husband died before the time of distribution; and when that time arrived the wife's share amounted to over 500*l*., but it had never amounted to that sum during the coverture. *Held*, that it was not bound: *Re Welstead, Welstead* v. v. *Leeds* (1882), 47 L. T. 331.

Effect of Married Women's Property Act, 1882.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has practically no effect on the construction of covenants to settle property of the wife, because by sect. 19 it is provided that "nothing in this Act contained shall interfere with or affect any settlement, or agreement for a settlement, made, or to be made, whether before or after marriage, respecting the property of any married woman."

For instance, where a woman married before the Act covenanted to settle her after-acquired property, other than property limited to her separate use, it was held that property bequeathed to her absolutely by a will which came into operation after 1882 (which was consequently her separate property under sect. 5 of the Act)

was not excepted from the covenant: *Re Stonor's Trusts* (1883), 24 Ch. D. 195; *Re Whitaker, Christian* v. *Whitaker* (1887), 34 Ch. D. 227; and where the covenant was by the husband alone, property which was left to the wife was held bound, as but for the Act it would have belonged to the husband: *Hancock* v. *Hancock* (1888), 38 Ch. D. 78; and so an infant wife's property was held bound, by her husband's assignment of personalty to which she was entitled in possession: *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307, and by a mere recital of an agreement in a deed to which the husband was a party: *Buckland* v. *Buckland*, [1900] 2 Ch. 534.

Property given with direction that it is not to be bound by covenant.

Where a covenant has been entered into for the settlement of the after-acquired property of a married woman, and a gift is afterwards made to her of such a nature as to come within the words of the covenant, no expression of the intention of the donor that it is not to be settled will exclude it from the operation of the covenant.

In *Re Mainwaring's Settlement* (1866), L. R. 2 Eq. 487 at p. 495, Wood, V.-C., seems to have considered that the intention of the donor could govern the construction of the covenant; but the judgment was not founded on this opinion, which is erroneous, and has been disapproved by Chitty, J., in *Re Allnutt, Pott* v. *Brassey* (1882), 22 Ch. D. 275; and by Cotton, Bowen, and Fry, L.JJ., in *Scholfield* v. *Spooner* (1884), 26 Ch. D. 94, where Bowen, L.J., says (at p. 101):—"Whether property falls within a covenant to settle after-acquired property or not, must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only, to my mind, a rule of construction; and the question must be whether, on the true construction of the covenant, the particular property falls within it or not. If that is the right view, it cannot be material to consider the intention with which after-acquired property has been given. A gift is not the less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declarations of intention as to what are to be the consequences can have

any effect"; and Fry, L.J., *Ibid.* (at p. 102), says:—"The question is one of considerable moment, viz., whether the intention of the donor can operate to take a gift out of the operation of the covenant, when, but for such expression of intention, the gift would have fallen within its operation. . . . Now, on principle, it appears to me to be impossible that that question can be answered in the affirmative. It seems to me that we must inquire, first, what is the construction of the covenant to settle; next, what is the gift; and that, if the gift comes within the scope of the covenant, then no expression of intention on the part of the donor can take it out of the operation of the covenant. In construing the gift we must consider what is the subject-matter of the gift, and what are the limitations subject to which it is made; and if it is found that those limitations are inconsistent with the limitations of the covenant to settle, then the Court may well conclude that the subject-matter of the gift does not come within the scope of the covenant. The intention of the donor of the gift cannot, in my judgment, be regarded, except so far as it bears on the nature of the gift he has made."

Restraint on anticipation.

Of course, if the married woman is effectually restrained from alienation the property cannot be settled: *Re Currey, Gibson* v. *Way* (1886), 32 Ch. D. 361; but if the restraint on anticipation applies only while the property is reversionary, the property must be settled when it falls into possession: *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333.

Where a settlor covenanted to settle his interest in (*inter alia*) any property of which he should become entitled by purchase and effected a policy subject to a condition that "it should not be assignable in any case whatever," it was held that such condition merely made the policy non-assignable at law (as it would have been prior to the Policies of Assurance Act, 1867, 30 & 31 Vict. c. 144), and did not prevent his assigning his beneficial interest therein, which he was consequently bound to do: *Re Turcan* (1888), 40 Ch. D. 5.

Divesting on alienation.

But where holding the property to be subject to the covenant would destroy the property, the property is not bound by the covenant: see per Chitty, J., *Re Allnutt, Pott* v. *Brassey* (1882), 22 Ch. D. 275 (at p. 280). Thus a life interest subject to forfeiture on alienation was held not to be within a covenant: *Re Crawshay, Walker* v. *Crawshay*, [1891] 3 Ch. 176, even if life interests not so subject would have been within the covenant, as to which no decision was given, but see *supra*, p. 587.

Covenant severs joint tenancy.

A covenant to settle property operates as a severance of a joint tenancy in such property.

The rule applies to cases in which the wife has an interest in the property at the date of the settlement: *Brown* v. *Raindle* (1796), 3 Ves. 256; *Caldwell* v. *Fellowes* (1870), L. R. 9 Eq. 410; *Baillie* v. *Treharne* (1881), 17 Ch. D. 388; and to cases in which she has no interest at such date: *Re Hewett, Hewett* v. *Hewett*, [1894] 1 Ch. 362.

Covenant by infant is voidable not void.

A covenant by an infant to settle property is voidable and not void.

Election.

The infant may on attaining twenty-one elect to avoid or affirm such a covenant; and if the covenantor be at the time of affirming it a married woman her affirmance binds all property to which she is then entitled, whether in possession or reversion or only contingently, but no other property: *Milner* v. *Lord Harewood* (1810), 18 Ves. 259; *Pimm* v. *Insall* (1848), 7 Hare, 193; *Ex parte Blake* (1853), 16 Beav. 463; *Smith* v. *Lucas* (1881), 18 Ch. D. 531; *Wilder* v. *Pigott* (1882), 22 Ch. D. 263; *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421. If the property be realty an acknowledged deed is not necessary: *Barrow* v. *Barrow* (1858), 4 K. & J. 409. Notwithstanding certain earlier cases a married woman who elects to avoid the covenant does not lose her interests which she is restrained from alienating in other property subject to the settlement: *Re Vardons Trusts* (1885), 31 Ch. D. 275.

Effect of Married Women's Property Act, 1882.

It must be remembered that, inasmuch as sect. 19 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) practically enacts that settlements are to be read as if that Act had not been passed, an infant wife's property (not settled expressly to her separate use) is often caught by an assignment by, or a covenant of, her husband, which she of course cannot avoid: *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; *Buckland* v. *Buckland*, [1900] 2 Ch. 534.

Covenant not enforceable by volunteers.

A covenant for the settlement of property cannot be enforced by volunteers.

Where such a covenant is contained in a marriage settlement only persons within the marriage consideration (that is, the husband and wife and issue of the marriage) can enforce it. The principal authorities for this rule are: *Colyear* v. *Mulgrave* (1836), 2 Keen 81; *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228; *Green* v. *Paterson* (1886), 32 Ch. D. 95 at pp. 105–6 (where the settlement

being post-nuptial, children of the marriage were held to be mere volunteers); *Attorney-General* v. *Jacobs Smith*, [1895] 2 Q. B. 341, (where all the cases are discussed). *Quaere* whether *Gale* v. *Gale*, 6 Ch. D. 144, which is *contrà*, can be supported: see per Lindley, L.J., *Attorney-General* v. *Jacobs Smith*, [1895] 2 Q. B. 341 at p. 349.

Covenant to leave by will.

A covenant to leave property or a share of property by will does not prevent *bonâ fide* dispositions of property during lifetime: *Fortescue* v. *Hennah* (1812), 19 Ves. 67; *Jones* v. *Martin* (1792), 3 Anst. 882; in D. P. (1798), 5 Ves. 266, n.; *Cochran* v. *Graham* (1811), 19 Ves. 63 at p. 66; *Needham* v. *Smith* (1828), 4 Russ. 318; but it appears that advancements made to other children since the date of the covenant must be brought into account: *Willis* v. *Black* (1828), 4 Russ. 170; reversing (1824), 1 Sim. & Stu. 525.

Creates a specialty.

Such a covenant creates a specialty: *Graham* v. *Wickham* (1863), 1 De G. J. & S. 474; and a voluntary covenant that one's executors shall pay over one's whole property is good: *Patch* v. *Shore* (1862), 2 Dr. & Sm. 589.

Covenant by a father, in a marriage settlement, by will or otherwise in his lifetime to give or assure one-fifth of his estate, subject to payment of a fifth of his debts, funeral and testamentary expenses, and legacies, to trustees upon a protected trust for the son for life, and subject thereto for his wife and issue. *Held*, that the trustees were entitled to a fifth of the testator's estate, notwithstanding a bequest of his estate to his children equally: *McCarogher* v. *Whieldon* (1867), L. R. 3 Eq. 236.

Where performed covenantee is legatee.

But if the covenant is performed, the legatee is a mere legatee and not a creditor. "The covenant . . . was simply that he would bequeath by will or otherwise provide that this share of residue should come to 'B.' He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the will was to make the lady a residuary legatee and nothing else:" per Jessel, M.R., *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. at p. 24.

Legacy may lapse.

Thus the bequest may be rendered nugatory by lapse. Where a father covenanted to leave a share upon trust for his daughter for life, with remainder to her children with survivorship in the event of their dying under twenty-one, and he did so by his will, but all the children predeceased him. *Held*, that a child who attained twenty-one took nothing: *Re Brookman's Trust* (1869), L. R. 5 Ch. 182.

A bequest, where there are no assets to provide for it, is not a performance: *Eyre* v. *Monro* (1857), 3 K. & J. 305; *Graham* v. *Wickham* (1863), 1 D. J. & S. 474.

Covenant may create a charge.

Such a covenant may create an actual charge on the covenantor's property. Covenant in a marriage settlement to pay an annuity, and to charge it on a sufficient part of the realty of which covenantor should die seised, but so that he should not be prevented from dealing with his realty during his life, or so only that sufficient realty was left charged with the annuity by his will. Devise of realty subject to the charges and incumbrances thereon. *Held*, that the settlement operated as a charge on the realty of which the testator died seised: *Montague* v. *Earl of Sandwich* (1886), 32 Ch. D. 525.

CHAPTER XXXIV.

EXECUTORY TRUSTS AND MARRIAGE ARTICLES.

Executory Distinguished from Executed Trusts: Direction to Settle as Counsel shall Advise: Technical Language Disregarded: Remainder to Heirs, or Heirs of Body, or Issue Construed so as not to give Fee to Tenant for Life: Exceptions (i.) Tenancy in Tail "ex provisione viri"; (ii.) If Part Strictly Settled: General Power of Appointment not given: Whether Life Estate to be sans Waste: Remainder to Heirs Construed as Strict Settlement: Rule against Perpetuities: Personalty Settled to go with Realty, not to Vest in Tenant in Tail who Dies under twenty-one without Issue: Personalty: Whether Life Estate to be without Power of Anticipation: Children Take as Tenants in Common: Power of Appointment among Children: Hotchpot Clause: Ultimate Trusts: Policies under Married Women's Property Acts: Issue meaning Children: Powers of Management to be Inserted: Sale and Exchange: Varying Securities: Partition: Leasing: Maintenance, Education, and Advancement: Appointing New Trustees: Powers of Charging not to be Inserted: Articles and Settlement Discrepant: If both ante-nuptial, Settlement Controls: If Articles only ante-nuptial, Articles Control: Specific Performance of Marriage Articles.

Inasmuch as "in construing the words creating an executory trust a Court of Equity exercises a large authority in subordinating the language to the intent" (per Lord Westbury, *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543 at p. 565), it becomes necessary to consider what is an executory, as distinguished from an executed, trust, and the distinction may be expressed thus:—

Executory distinguished from executed trust.

A trust is called executory, where the statement of the trusts is incomplete, and requires to be further expressed by a subsequent instrument; and is called

executed, where the statement of the trusts is complete and final.

"Wherever the assistance of trustees, which is ultimately the assistance of this Court, is necessary to complete a limitation, in that case, the limitation of the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law:" per Sir R. Henley, L.K., *Austen* v. *Taylor* (1759), 1 Ed. 361 at p. 368; Amb. 376; cited per Plunket, C., *Herbert* v. *Blunden* (1837), 1 Dr. & Wal. 78 at p. 91.

"All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But . . . a Court of Equity considers an executory trust, as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?" per Lord St. Leonards, *Egerton* v. *Earl Brownlow* (1853), 4 H. L. C. 1 at p. 210.

An executory instrument is one which "directs the execution of another instrument for the purpose of enabling the trust to be performed:" per Stuart, V.-C., *Osborn* v. *Bellman* (1860), 9 W. R. 11.

Executory trusts are contained in marriage articles, voluntary settlements, or wills.

It is often difficult to determine whether a trust is executed or executory. Executory trusts are usually contained in marriage articles, voluntary settlements, or wills; but in the case of marriage articles "the nature of the instrument establishes the fact" that the trust is executory. In the case of the other instruments that fact "must be collected from the nature of the dispositions in the instruments:" per Sugden, C. (Ir.), *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 21.

"Voluntary settlements and wills generally stand on the same footing. The settlement cannot stand on a footing inferior to that of a will: for the very act of making the settlement *inter vivos* rather leads to the inference that a strict settlement was intended; in both, however, the rule of law is clear; the intention must be collected from the four corners of the instrument, and the nature of the instrument does not enable the Court to say that a strict

settlement was intended. In marriage settlements the nature of the instrument leads to that conclusion; but in the case of a voluntary settlement, or even a settlement for valuable consideration not upon marriage, there is nothing irrational in a limitation to a son of the settlor in tail; it may be improvident, but it is difficult to say that it could not have been intended. I must suppose that those who use technical words intend to use them in a technical sense, unless something to the contrary appears. In this case, then, I must look for the intention upon the face of the instrument itself. If I come to the conclusion that it is an executory trust, there is no difference whatsoever between executory trusts, whether created by marriage articles, by a voluntary settlement, or by a will. There is, indeed, in the latter case, much greater difficulty in arriving at the conclusion that the trust is executory; for, in the first case, the nature of the instrument establishes the fact; in the others, it must be collected from the nature of the dispositions in the instruments. . . . I admit that, although this trust is so far executory as to leave something to be done, yet the party may afterwards have become, as it is styled, 'his own conveyancer,' that is, he may have defined so clearly his intention as to the limitations of the settlement as to leave no room for ambiguity or doubt; if he had done so, I must have given to the words he has used their legal operation:" per Sugden, C. (Ir.), *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p 20; reported to the same effect, 1 Con. & Law, 158 *et seq.*

Direction to settle as counsel shall advise.

A direction to settle "as counsel shall advise," affords a strong indication that the trusts are executory: *White* v. *Carter* (1766), 2 Ed. 366; affirmed on rehearing (1768), 2 Amb. 670; but a mere direction to convey does not of itself render a trust executory: *Franks* v. *Price* (1840), 3 Beav. 182; *Doncaster* v. *Doncaster* (1856), 3 K. & J. 26 at p. 35.

"The words 'as counsel shall advise' must be read as qualifying the dispositions; you would not go to counsel and ask his advice merely as to the proper form of conveyance to be used, whether feoffment, bargain and sale, or lease and release, but you would also inquire how the limitations should be framed:" per Sugden, C. (Ir.), *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 21.

The question whether trusts contained in wills are or are not executory is foreign to the scope of this treatise, and since as above

mentioned the only instruments, other than wills, in which executory trusts are commonly contained are marriage articles and voluntary settlements, the rules hereinafter stated are confined to those instruments, but, inasmuch as "I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention:" per Grant, M.R., *Blackburn* v. *Stables* (1814), 2 V. & B. 367 at p. 369; and "there is no difference whatsoever between executory trusts whether created by marriage articles, by a voluntary settlement, or by a will:" per Sugden, C. (Ir.), *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 20, certain of the cases on wills are cited as authorities.

Technical language may be disregarded.

In the case of executory trusts, the technical language of limitations may be disregarded if it appear on the face of the instrument directing the limitations that such technical language cannot be inserted in the limitations without defeating the intention of the parties.

"In matters executory, as in case of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, this Court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner so as may best answer the intent of the parties:" per Lord Cowper, C., *Stamford v. Hobart* (1710), 3 Br. P. C. (Toml. ed.) 31 at p. 33.

"Articles are considered [in equity] as minutes only, and the settlement may afterwards explain more at large the meaning of the parties:" per Lord Hardwicke, C., *Blandford* v. *Marlborough* (1743), 2 Atk. 542 at p. 545.

"If it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words, in order to execute his intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and have never said that merely because the direction was for an entail, they would execute that by decreeing a strict settlement:" per Sir Wm. Grant, M.R., *Blackburn* v. *Stables* (1814), 2 V. & B. 367 at p. 370.

Inasmuch as it is obvious from the fact that a settlement is

directed that it is not intended that the first taker shall take the fee, land will not be limited in such a way as to enable the first taker to acquire the fee, and it is a rule that—

First taker is not to have the fee.

> A limitation to one for life, with remainder to his heirs, or the heirs of his body, or his issue, will be construed so as to give him a life estate only.

"When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention:" per Grant, M.R., *Blackburn* v. *Stables* (1814), 2 V. & B. 367 at p. 370.

See also *Jones* v. *Laughton* (1698), 1 Eq. Ca. Ab. 392; *Trevor* v. *Trevor* (1720), 1 Eq. Ca. Ab. 387; 1 P. Wms. 622; 5 Bro. P. C. (Toml. ed.) 122; *Streatfield* v. *Streatfield* (1725), Ca. t. Talb. 176; per Lord Eldon, C., in *Jervoise* v. *Duke of Northumberland* (1820), 1 J. & W. 559 at p. 574; *Davies* v. *Davies* (1841), 4 Beav. 54; per Sugden, C., *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 20; 1 Con. & Law. 158; per Lord Cairns, *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543 at p. 572.

Gavelkind; or Borough-English.

It makes no difference in the construction of the articles that the land is gavelkind: *Roberts* v. *Dixwell* (1738), 1 Atk. 607; or Borough-English: *Starkey* v. *Starkey* (1745), 8 Bac. Abr. 302 (7th ed.).

Thus a strict settlement was decreed in *Leonard* v. *Sussex* (1705), 2 Vern. 526, where the words were "taking special care in such settlement that it never be in the power of either of the said A. and B. to dock the entail": *Papillon* v. *Voice* (1728), 2 P. Wms. 471, where money was given to be laid out in the purchase of land to be settled on B. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of B., with remainders over, with power to B. to "make a jointure": *Lord Glenorchy* v. *Bosville* (1733), Cas. t. Talb. 3; 1 Wh. &. Tud. 1, where the settlement was to be made to A. for life, without impeachment of waste, voluntary waste in houses alone excepted, remainder to her husband for life, remainder to the issue of her body with remainders over: *White* v. *Carter* (1767), Amb. 670, where the settlement was to be made "as counsel should

advise on A. and the heirs male of his body, to take in succession and priority of birth": *Bastard* v. *Proby* (1788), 2 Cox, 6; where the settlement was to be made "as counsel should advise, in trust for A. for life, and after her death, then on the heirs of her body lawfully issuing; but in case A. should die without leaving issue, &c.": *Shelton* v. *Watson* (1849), 16 Sim. 543, where there was a direction to purchase an estate "to be made hereditary and settled on my here constituted heir, and to descend to his heirs, or, dying without issue, as I shall now provide for. I hereby constitute A. my heir and successor; and the said estate, when purchased, is to be settled on him, his heirs and successors in the direct male line lawfully begotten and born in wedlock. In case the said A. die without issue," remainders over; "my object, intent, desire and command, being that the said estate shall never pass out of my family, and that no person shall hold it under any other name than the name of B.:" and *Thompson* v. *Fisher* (1870), L. R. 10 Eq. 207, where the settlement was to be made "to the use of A. and the heirs of his body lawfully issuing, but in such manner and form nevertheless, and subject to such restrictions and limitations as that if the said A. shall happen to die without leaving lawful issue" the property should descend to testator's daughter.

Agreement by husband in marriage articles to convey lands in trust for himself for life, and, if the intended wife survived him, to her use and that of their child or children; if no child, to the use of the intended wife and her heirs. *Held*, that the settlement ought to give the intended wife a life estate, with remainder to the children of the marriage: *Rossiter* v. *Rossiter* (1864), 9 Ir. Jur. N. S. 373; affirming (1863), 14 Ir. Ch. R. 247.

In *Collins* v. *Plummer* (1708), 1 P. Wms. 104, land was limited to the husband and the heirs of his body with a covenant that the husband should not suffer a recovery, it was held that the deed was a settlement and could not be treated as articles, since it was clear that the parties intended to rely on the covenant.

Exceptions.

There are moreover two exceptions to the rule:—

Where one parent alone could not defeat settlement.

First.—Where, in the case of articles executed prior to the Fines and Recoveries Act, 3 & 4 Will. IV. (1833) c. 74, the property of the husband was settled on the wife and the heirs of her body: for this created an estate tail *ex provisione viri*, which could not be barred by either husband or wife alone: see *Greneley's Case* (1609), 8 Rep. 71 b; *Honor* v. *Honor* (1710), 1 P. Wms. 123; *Whateley* v. *Kemp* (1734), cited 2 Ves. Sen. 358; per Lord Hardwicke, *Green* v. *Ekins* (1742), 2 Atk. 473 at p. 477; *Highway*

v. *Banner* (1785), 1 Bro. C. C. 584; per Lord Hatherley, C., *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543 at p. 554. But this exception does not exist when the articles are made after 1833: per Sugden, C., *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1 at p. 19.

Where articles settle part strictly.

Second.—If part of the land be by the articles themselves settled in strict settlement, and other part be limited to the first taker, and the heirs of his body; for this shows that the parties knew how to limit the estate in strict settlement when they wished to do so: *Chambers* v. *Chambers* (1730), Fitz.-G. 127; Mos. 333; 2 Eq. Ca. Ab. 35, pl. 4; *Howel* v. *Howel* (1751), 2 Ves. Sen. 358.

Trustees to preserve.

Formerly, where the Court decreed a strict settlement, it inserted proper limitations to trustees to preserve contingent remainders: *Stamford* v. *Hobart* (1710), 3 Bro. P. C. (Toml. ed.) 31; *Baskerville* v. *Baskerville* (1741), 2 Atk. 279; *Harrison* v. *Naylor* (1790), 2 Cox, 247; 3 Bro. C. C. 108; *Woolmore* v. *Burrows* (1827), 1 Sim. 512.

General power of appointment not given.

Upon similar principles a general power of appointment, which would have enabled the appointor to defeat the whole settlement, was cut down to a special power to appoint amongst children in *Bristow* v. *Warde* (1794), 2 Ves. Jun. 336; but Lord St. Leonards observes (Sugd. Pow. (8th ed.) p. 439) that this case must not be considered as establishing a general rule; and see Chance on Powers, c. 5, s. 2, p. 143; the principle was followed in *Gould* v. *Gould* (1856), 25 L. J. Ch. 642; 2 Jur. N. S. 484, a case on an executed settlement; but in *Wood* v. *Wood* (1870), L. R. 10 Eq. 220, Lord Romilly, M.R., refused to follow *Gould* v. *Gould* in construing an *executed* settlement. His Lordship said:—"The general principle is that a general power of appointment cannot be cut down to a limited power of appointment among children, except by express words;" and he held that "on the general scope of the deed" before him the general power could not be cut down.

Life estates. Impeachment for waste.

The question whether life estates limited in pursuance of an executory trust are to be made impeachable for waste is discussed in *Leonard* v. *Sussex* (1705), 2 Vern. 526; *White* v. *Briggs* (1847), 15 Sim. 17; 2 Ph. 583; *Davenport* v. *Davenport* (1863), 1 H. & M. 775; *Stanley* v. *Coulthurst* (1870), L. R. 10 Eq. 259; and *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543. The principle appears to be that if the settlor or testator has expressly directed a life estate to be given, it must be made liable to impeachment for waste; but, on the other hand, if the words used would *per se* give the first taker an estate of inheritance, the life estate to which it is cut down is

not to be made impeachable for waste: see 3 Dav. Conv. p. 280, note c.

Life estate without power of anticipation.

In *Clive* v. *Clive* (1872), 20 W. R. 477, where, by the articles, a life estate was given to a woman without power of anticipation, it was held that it should not be *sans* waste, as a life estate *sans* waste would be inconsistent with a life estate without power of anticipation; but as to this doctrine see *Re Lumley, Ex parte Hood-Barrs*, [1896] 2 Ch. 690.

A further rule on the subject is this:—

Heirs, or heirs of body, means sons to take successively in tail, daughters as tenants in common in tail, with cross remainders.

> A remainder to heirs, heirs of the body, or issue will be construed so as to create a strict settlement on sons successively in tail, with remainder to daughters as tenants in common in tail, with cross remainders between them.

Rule is the same where there is no express estate for life to parent.

The rule is applied even in cases where no express limitation for life is made to the parent in the articles, so that the rule in *Shelley's Case* does not apply, and a settlement made strictly in conformity with the articles would not be liable to be defeated by him: *Griffith* v. *Buckle* (1686), 2 Vern. 13; *Cusack* v. *Cusack* (1714), 5 Bro. P. C. (Toml. ed.) 116; *Grier* v. *Grier* (1872), L. R. 5 H. L. 688.

The case of *Nandick* v. *Wilkes* (1716), 1 Eq. Ca. Ab. 393, pl. 5; S. C. *sub nom. Nandike* v. *Wilkes*, Gilb. Eq. Rep. 114, shows that "heirs of the body" mean, and the cases of *Hart* v. *Middlehurst* (1746), 3 Atk. 371; *Dod* v. *Dod* (1755), Amb. 274; *Prebble* v. *Boghurst* (1818), 1 Swanst. 309 (see p. 332); *Trevor* v. *Trevor* (1842), 13 Sim. 108; (1845), 1 H. L. C. 239; *Phillips* v. *James* (1865), 2 Dr. & Sm. 404; 3 De G. J. & S. 72; 13 W. R. 934, show that "issue" means, both sons and daughters. In all these cases, except *Prebble* v. *Boghurst*, where the point did not arise for decision, it was held that the sons took successive estates in tail with remainder to the daughters in tail; and, after some conflict of authorities, it appears to be the better opinion that the latter take as tenants in common in tail with cross remainders: *West* v. *Errissey* (1727), 2 P. Wms. 349; 1 Bro. P. C. 245; *Phillips* v. *James* (1865), 2 Dr. & Sm. 400; 3 De G. J. & S. 72; 13 W. R. 934.

The reason for the rule is stated in *Grier* v. *Grier* (1872), L. R. 5 H. L. 688, by Lord Cairns, who says (at p. 706):—"In executing this provision in the marriage articles, the Court of Chancery would have made, under the term 'issue,' a provision in some way or other for the whole of the children of the marriage both male and

female . . . by raising and creating estates tail; because otherwise the first line only would have been provided for, whereas the term 'issue,' as we know, includes descendants *ad infinitum*. . . . The only question which remains . . . is this:—Would the interest . . . have been created by giving estates tail to the children concurrently, or would it have been created by giving estates tail to them successively? In either case you provide for the children of the marriage, or the issue of the marriage, *ad infinitum*. . . . I entirely agree with the observation made in the Court below, that great weight is to be attributed to the term which is used, namely, 'settle.' As I understand that word, it must mean this, that the husband agrees to settle—that is to say, to make a settlement of—the property upon the issue of the marriage. And that being the meaning of the word 'settled,' I hold it to be an established rule, . . . that when, after a life estate is either given or reserved to the father upon the occasion of a marriage, there is a contract to make a settlement of real estate upon the issue of the marriage that must be effected by giving successive estates tail to the children of the marriage. . . . The reason . . . is this—that the rule which the Court of Chancery has laid down for itself is, in limiting estates by way of purchase to the issue of a marriage, to go as near as possible to that line of devolution of the property which would have taken place if the father in the first instance had remained the proprietor of an estate tail. In that case the estate would have gone first to the sons in succession, and then to the daughters as heirs of tail together. And while the Court of Chancery secures to the children estates by way of purchase, which cannot be defeated by the parent, it preserves at the same time the line of devolution, *cy-prés*, as near as possible to that line which would have been followed if the father had taken first an estate tail."

Settle.

"Issue, their heirs and assigns for ever."

The same construction was placed on "issue, their heirs and assigns for ever" by Kindersley, V.-C., in *Phillips* v. *James* (1865), 2 Dr. & Sm. 404, on the ground that if the words "their heirs and assigns" had been omitted there would have been enough to give estates tail to the children as purchasers, and that the addition of the words "their heirs and assigns for ever" could make no difference. This decision was affirmed on appeal, 3 De G. J. & S. 72; 13 W. R. 934, Knight-Bruce, L.J., dissenting.

Form of gift over.

In *Dillon* v. *Blake* (1864), 16 Ir. Ch. R. 24, by a post-nuptial agreement for valuable consideration, land was to be settled upon B., eldest son of A., "and his issue," with remainder, in the event of B. dying in the lifetime of A. without lawful issue, "to each of

the other sons of A. in succession according to their seniority," with an ultimate remainder to the right heirs of A. B. survived A. and had issue. *Held*, that B. was entitled to an estate tail in possession with remainder to himself in fee. The decision turns on the form of the gift over on B.'s death.

Where the direction was to settle land to the use of every son of J. S. and his assigns during his life; and after his decease to the use of such son's first and other sons successively in tail male, and on failure of such issue to the use of the settlor's heirs. *Held*, that the sons took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male with cross remainders over: *Surtees* v. *Surtees* (1871), L. R. 12 Eq. 400.

"Issue, whether son or daughter."

The words "issue, whether son or daughter, if begotten on the body of, &c.," were held to make the children take as tenants in common (apparently in fee), with cross limitations over on the death of any child under twenty-one, and without issue: *Taggart* v. *Taggart* (1803), 1 Sch. & Lef. 84.

"Shares."

In *Thompson* v. *Simpson* (1841), 1 Dru. & War. 459, where there was a covenant to settle land on trust "for the issue of H. by N.," in such shares as H. should appoint, and in default as N., in case she survived H., should appoint, it was held that in default of appointment the children took as tenants in common in fee simple.

"Heirs of the body," following limitation to "heirs male of the body."

Where the words "heirs of the body" are inserted after a limitation to "heirs male of the body," they may point not to providing for the daughters of the settlor, but only to letting in the daughters of the sons, by giving estates in tail general to the sons.

This construction will be aided if the articles make provision for the settlor's daughters by way of portions. It prevailed in *Powell* v. *Price* (1729), 2 P. Wms. 535; 2 Eq. Ca. Ab. 40, where the provisions for the children were to the use of the sons of the marriage "in tail male successively, remainder to the heirs male of the body" of the settlor by any wife, remainder to "the heirs of his body" by the intended wife, and for want of such issue remainder to the right heirs of the settlor; it was provided that if the settlor should die without issue male by his intended wife, and there should be daughters, portions should be raised for such daughters. See the remarks on this case in *Maguire* v. *Scully* (1828), 2 Hog. 113 at p. 138; Beatt. 370.

"Heirs male of the body," or "issue male."

But if provision is made for the "heirs *male* of the body" or "issue *male*," the sons take successively in tail *male*, and daughters do not take: *Cusack* v. *Cusack* (1714), 5 Bro. P. C. (Toml. ed.) 116; and *Brennan* v. *Fitzmaurice* (1839), 2 Ir. Eq. R. 113, where the

words were "heirs male of the body:" *Trevor* v. *Trevor* (1720) 5 Bro. P. C. (Toml. ed.) 122; 1 Eq. Ca. Ab. 387; 1 P. Wms. 622, where the words were "heirs male of the body and the heirs male of such heirs male issuing:" *Maguire* v. *Scully* (1828), 2 Hog. 113; Beatt. 370.

"First male issue.

"First male issue lawfully begotten which should attain the age of twenty-one years" means the first son who attains twenty-one: *Hampson* v. *Brandwood* (1816), 1 Madd. 381.

"Issue male."

Where the articles reserved a power to the wife to appoint to "her issue male by the intended husband." *Held*, that a son of her daughter by him was not an object of the power: *Lambert* v. *Peyton* (1860), 8 H. L. C. 1.

"Heirs female of the body."

And "heirs female of the body" means daughters: *West* v. *Errissey* (1726), 2 P. Wms. 349; 1 Bro. P. C. (Toml. ed.) 225.

Where land was directed "to be purchased to be added and closely entailed to the family estate, now in the possession of T. B., the object being to have a head to the family, and if T. B. died without male issue or disposing of the family estate, the residue to go to A. B. or his nearest relative in the male line." *Held*, that the settlement ought to be on A. B. for life, with remainder to his sons successively in tail male, with remainder to his brothers born and to be born in similar manner, but that no estates should be limited to any ancestor of A. B.: *Woolmore* v. *Burrows* (1827), 1 Sim. 512 at p. 529.

Settlement of personalty with ultimate trust for the wife's next of kin, with a covenant to settle after acquired property "on the like trusts." *Held*, that after acquired realty belonged on the wife's death to her heir at law: *Brigg* v. *Brigg* (1885), 33 W. R. 454: 54 L. J. Ch. 464.

Rule against perpetuities.

Moreover, although the limitations directed to be inserted in the settlement would, if inserted in the words directed by the articles, be too remote, the direction will not be void, but the settlement will be framed, so as, as far as possible, to give effect to the intention without containing limitations which would be too remote.

Thus where a settlement directed certain trustees to settle real estates to the use of such persons for such estates and in such manner that the same should, so far as the law would permit, be strictly settled so as to go along with a peerage so long as the person possessed thereof should be a lineal descendant of the settlor, and that during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents of the estates might be equally divided among the co-heirs

per stirpes of the person or persons respectively, by reason of whose death or deaths without issue male such suspension or abeyance should be, for the time being, occasioned, it was held that the trust was not void for remoteness: *Bankes* v. *Le Despencer* (1840), 10 Sim. 576.

Covenant to settle personalty by reference to strict settlement of realty.

If freeholds are settled in strict settlement, and there is a covenant to settle personalty on like trusts, a proviso must be inserted that it shall not vest absolutely in any tenant in tail by purchase who dies under the age of twenty-one without leaving issue.

Jekyll, M.R., considered that the proper plan was to insert a gift over on the death of the tenant in tail under twenty-one: *Stanley* v. *Leigh* (1732), 2 P. Wms. 686 at p. 690; Lord Hardwicke, C., suggested that it should be on his death without issue before twenty-one: *Gower* v. *Grosvenor* (1740), Barn. Ch. Rep. 54 at p. 63; 5 Madd. 337 at p. 348; and Lord Loughborough, C., gave an express decision to this effect in *Newcastle* v. *Lincoln* (1797), 3 Ves. 387, but before the appeal to the House of Lords (*Lincoln* v. *Newcastle* (1806), 12 Ves. 218), the first tenant in tail had attained the age of twenty-one, and therefore the only point there decided was that he had become absolutely entitled.

"Where the trusts" (*i.e.*, of personalty) "are executory . . . there has been considerable difference of opinion, and I do not consider the law as finally settled by authority; but if it is so, it is in favour of the introduction of particular conditions, such as the attainment of twenty-one, into the limitations. Such a restraint was certainly upheld in *Lady Lincoln* v. *Duke of Newcastle*. That case, however, may be open to observation, Lord Eldon having always protested against it:" per Page Wood, V.-C., *Scarsdale* v. *Curzon* (1860), 1 J. & H. 40 at p. 51.

A collection of forms used by eminent conveyancers will be found in *Harrington* v. *Harrington* (1871), L. R. 5 H. L. 87 at p. 93, n., from which it appears that the form giving over the property on death under twenty-one without issue had been adopted by the Court.

Personalty.

It is difficult to lay down any rule for the construction of articles for the settlement of personalty.

Articles and wills distinguished.

The cases on settlements directed by wills throw but little light on the construction of marriage articles, because, in the former case, there is nothing but the words of the will to guide the

construction; while in the latter case the parties must have intended to provide for the wife and issue of the marriage.

Restraint on anticipation.

If the articles expressly provide for the settlement of the wife's property on her for life "for her separate use," the Court will not add a restraint on anticipation: *Symonds* v. *Wilkes* (1865), 13 W. R. 1026, reversing 12 W. R. 541; but if separate use is left to implication the restraint on anticipation will be inserted: *Stanley* v. *Jackman* (1857), 23 Beav. 450; possibly the real distinction between these cases is that in *Symonds* v. *Wilkes* the articles were not strictly speaking executory: and in *Re Dunnill's Trusts* (1872), Ir. R. 6 Eq. 322; and *Dowd* v. *Dowd*, [1898] 1 I. R. 244 (both will cases), though there was a provision that the property should be settled "for her separate use," the Court added a restraint on anticipation.

Children take as tenants in common;

It appears that the Court inclines to make children take as tenants in common rather than as joint tenants: *Liddard* v. *Liddard* (1860), 28 Beav. 266; *Mayn* v. *Mayn* (1867), L. R. 5 Eq. 150; but in *Re Bellasis' Trust* (1871), L. R. 12 Eq. 218, where the words were "for my niece and her children," it was held that the children took as joint tenants after the niece's death.

at twenty-one, or in case of daughters, on marriage.

Where marriage articles provided for the wife's property being vested in trustees, "the trusts of the income being for the benefit of the said *husband* and *wife* during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said *husband* and *wife*, or the survivor of them; and in default of appointment, for the children equally; and in the event of there being no children, and of the said *husband* being the survivor, the trust property to be at his absolute disposal." *Held*, that the articles ought to be carried into effect by giving the wife the first life interest to her separate use, and by making the shares of sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer, on the deaths of sons under twenty-one, and of daughters under that age unmarried: *Cogan* v. *Duffield* (1876), 2 Ch. D. 44.

Power of appointment amongst children.

And a power for the husband and wife by deed or the survivor by deed or will to appoint among the children should be inserted: *Re Gowan, Gowan* v. *Gowan* (1880), 17 Ch. D. 778 (a case on a will); unless there is a direction for equal division: *Re Parrott, Walter* v. *Parrott* (1886), 33 Ch. D. 274 (a case on a will); the power should not be given to the wife only, even if the fund is hers: *Cogan* v. *Duffield* (1876), 2 Ch. D. 44 at p. 49 (a case on articles); *Re Gowan,*

Gowan v. *Gowan* (1880), 17 Ch. D. 778 (a case on a will), differing from *Oliver* v. *Oliver* (1878), 10 Ch. D. 765 (a case on articles).

Hotchpot clause.

A hotchpot clause should now be inserted. Thus, in *Miller* v. *Gulson* (1884), 13 L. R. I. 408, Chatterton, V.-C., says (at p. 428) :— "Then comes the question whether the hotchpot clause is one of those usual clauses which would be inserted as of course. . . . I had occasion to consider a similar question in *Lees* v. *Lees* (1871), Ir. R. 5 Eq. 549, as to articles executed in 1811, and arrived at the conclusion that it was not shown that at that time the hotchpot clause was so usual as to authorise its being introduced. The articles here are nineteen years later in date, and having regard to the authorities and precedents referred to, I am of opinion that a hotchpot clause would be introduced into a settlement executed in pursuance of them."

Trusts in default of children.

Where a fund of personalty was given by deed, apparently voluntary, by a man to his daughter to be settled "upon her and her issue," so that during her lifetime "the same might not be liable or subject to the debts, control, or engagements of any husband" whom she might marry. *Held*, that the settlement ought to give the daughter a power of appointment by will in default of issue : *Stanley* v. *Jackman* (1857), 23 Beav. 450.

Ultimate trusts.

In *Kentish* v. *Newman* (1713), 1 P. Wms. 234, the covenant was to invest a sum of money in the purchase of an annuity to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and until the settlement should be made the money was to be applied for the separate use of the wife ; if no settlement was made during the joint lives of the husband and wife, the money was to be to the sole use of the wife, if living, but if she died before her husband, to her brother and sister. It was held that the brother and sister of the wife took only if she predeceased her husband without leaving issue.

A father, on his daughter's marriage, agreed by a memorandum in writing "to charge my property with 1,000*l.* as her fortune, to be settled in trustees for her benefit, she to receive the interest at 5 per cent. on her sole and separate receipt during the term of her natural life ; but if she has a family, she is to have the power of disposing of it amongst her children in such shares and proportions as she and her husband may think proper ; I to have the power to lodge the 1,000*l.*, with her consent and that of her trustee, in any security we may agree upon." No settlement was ever executed, and the wife died without issue. *Held*, that the husband, as his wife's administrator, was entitled to the 1,000*l.* and to specific

performance against the father, notwithstanding the contention of the father that there was a resulting trust for him: *Dennehy* v. *Delany* (1876), Ir. R. 10 Eq. 377.

Policies effected under Married Women's Property Act.

By sect. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "a policy of insurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them . . . shall create a trust in favour of the objects therein named." This is practically a re-enactment of sect. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93). Policies issued under these sections appear generally to state that they are "for the benefit of his wife A., and of the children of their marriage." If they so provide the widow and children take as joint tenants: *Re Seyton, Seyton* v. *Satterthwaite* (1887), 34 Ch. D. 511 (explaining *Re Mellor's Policy Trusts* (1877), 7 Ch. D. 200, and *Re Adam's Policy Trusts* (1883), 23 Ch. D. 525); *Re Davies' Policy Trusts*, [1892] 1 Ch. 90. Where the policy was expressed to be "for the benefit of his wife and children," a second wife and a child of the second marriage were held entitled to participate jointly with the children of the wife to whom the assured was married at the date of the policy: *Re Browne's Policy, Browne* v. *Browne*, [1903] 1 Ch. 188; and where the words were "for the benefit of his wife, or if she be dead, between his children in equal proportions" it was held that the children of a second marriage were, but a second wife was not, entitled to participate: *Re Griffiths' Policy*, [1903] 1 Ch. 739.

"Issue meaning "children."

Whether the articles relate to realty or personalty, the word "issue" may be explained to mean "children."

Where, according to the terms of the articles, the husband was to have a general power of appointment, and in default of appointment the trust fund was to be divided among "the issue of the marriage," it was held, first, that the power intended must, from the circumstances and purpose of the instrument, be taken to be only a limited power to appoint to "issue of the marriage," and, secondly, that "issue of the marriage" was to be construed "children": *Bristow* v. *Warde* (1794), 2 Ves. Jun. 336.

By articles made for value after marriage it was agreed that leases for lives and years should be conveyed to trustees, in trust for A. and B. successively for life, and after the death of B. for the "issue" of B. and C. (his wife) as B. should appoint, and in default for "such children" share and share alike, and in default of "such

issue," for the heirs, executors, and administrators of the said B. during the said leases: and that a sum of money, or the lands agreed to be purchased therewith, should go (after the deaths of B. and C.) to "the issue" of the said B. and C., as B. and C. or the survivor should appoint, and in default should be equally divided among "such children" share and share alike, and if there should be no "issue" of the said marriage, or if all "such issue" should die under twenty-one, over. *Held*, that "issue" must be read "children:" *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281.

By marriage articles a reversionary interest in personalty was agreed to be settled on the husband and wife successively for life, and after the death of the survivor on the "issue of the marriage" living at the death of the survivor of the husband and wife as the husband should appoint, and in default of appointment then on "such issue" in equal shares if more than one, and if but one, then the whole to go to "such only child;" and if there should be no "issue of the marriage" living at the death of the survivor of the husband and wife, then as the husband should appoint. *Held*, that "issue" meant "children:" *Swift* v. *Swift* (1836), 8 Sim. 168.

Articles on marriage to settle freeholds, after the death of the husband, to "go to and be vested in the issue of" the husband and wife, "and that such issue should also be entitled to a further sum of 1,000*l.*" (to be charged on other property) "in such shares and proportions as" the husband should appoint; in default, as the wife should appoint; and in default, "in equal shares if there should be more than one of such issue born in the said (husband's) lifetime, or in a reasonable time after his death." *Held*, that "issue" meant "children:" *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459.

By marriage articles it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest and also the principal sum (subject to an annuity by way of jointure for the wife) to the "issue of the said intended marriage," as the husband should appoint; and in default of appointment, to "all the issue" in equal shares, "to such of the said issue" as should be sons, at twenty-one, and to such of them as should be daughters, at twenty-one or marriage; and that there should be a power of advancement for "the said issue of the marriage" to the extent of one-half of the share of "such child respectively;" and if there should be "no issue of the intended marriage, or all such issue should die in the lifetime of" the husband, then the whole trust fund should (subject to the jointure)

vest and be assigned, and go to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. And it was further agreed that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper. *Held*, that the word "issue" was to be read "children:" *Roche* v. *Roche* (1845), 2 Jo. & Lat. 561.

Power to appoint to "issue."

In *Bell* v. *Bell* (1862), 13 Ir. Ch. R. 517, a power of appointment in favour of issue was on the context explained to mean a power to appoint life estates only to the children alive at the date of the deed, with remainders to their issue in strict settlement.

By marriage articles it was agreed that personalty should be settled upon trust (after the deaths of husband and wife) for "the issue of the intended marriage" as the husband should appoint, "but if only one child," for "such only child." There was no trust for the children in default of appointment. It was held that "issue" meant "immediate issue" or children: *Lees* v. *Lees* (1871), Ir. Rep. 5 Eq. 549 at p. 558.

As to the powers to be inserted.

The powers to be inserted in a settlement will be the same whether the instrument directing the settlement to be made is a will, marriage articles, or voluntary settlement.

There is a palpable difference (see per Shadwell, V.-C., *Hill* v. *Hill* (1834), 6 Sim. 136 at p. 144) between powers of management, such as powers of leasing or of sale, which are to be exercised for the benefit of the estate, and powers of charging the estate, such as powers of jointuring, and of charging portions.

It was formerly considered that no powers ought to be inserted in the settlement, unless they were expressly authorised by the instrument directing the settlement to be made: see *Wheate* v. *Hall* (1810), 17 Ves. 80; *Brewster* v. *Angell* (1820), 1 J. & W. 625.

According to the modern practice—

Powers of management are, powers of charging are not, inserted.

> Powers of management will generally be inserted in the settlement (unless they are omitted in reliance on the Settled Land Act, 1882 (45 & 46 Vict. c. 38)), while powers of charging will not be inserted.

Expressio unius, &c., not now applied.

It was once thought that the doctrine of *expressio unius est exclusio alterius* was applicable in determining what powers should be inserted, and that if the executory instrument expressly directed the insertion of specified powers, the words "usual powers" coming afterwards would only authorise the insertion of such usual

powers as were *ejusdem generis* as those specially authorised: *Pearse* v. *Baron* (1821), Jac. 158; *Hill* v. *Hill* (1834), 6 Sim. 136 at p. 141; or even would not authorise the insertion of any other powers: *Brewster* v. *Angell* (1820), 1 J. & W. 625; *Horne* v. *Barton* (1822), Jac. 437; unless the words were in a distinct clause: *Lindow* v. *Fleetwood* (1835), 6 Sim. 152. But this doctrine would not now be followed.

Sale and exchange.

Though it was formerly thought that a power of sale and exchange could not be inserted without express directions: *Wheate* v. *Hall* (1810), 17 Ves. 80; *Brewster* v. *Angell* (1820), 1 Jac. & W. 625; and *Horne* v. *Barton* (1822), Jac. 437 (all cases of wills); it appears now to be the rule that whether there is a simple direction to settle: *Turner* v. *Sargent* (1853), 17 Beav. 515; *Wise* v. *Piper* (1880), 13 Ch. D. 848; or a direction that the settlement shall contain all usual clauses: *Peake* v. *Penlington* (1813), 2 V. & B. 311; *Hill* v. *Hill* (1834), 6 Sim. 136; *Duke of Bedford* v. *Marquess of Abercorn* (1836), 1 Myl. & Cr. 312; a power of sale and exchange ought to be inserted.

Realty subject to same trusts as personalty.

In *Williams* v. *Carter* (1818), Sugd. Pow. (8th ed.) Append. p. 945; and in *Elton* v. *Elton*, No. 2 (1860), 27 Beav. 634, where realty became, by the operation of a covenant for settling after-acquired property, subject to the same trusts as personalty, as to which latter there was a power to vary investments, it was held that the settlement of the real estate ought to contain a power of sale and exchange, such power being as to realty analogous to the power to alter and vary given in respect of the personalty.

Where a settlement of personalty contained a power to the trustees to invest in the purchase of land to be held "upon such trusts as would best correspond with the then subsisting trusts," and that such purchased land "should be considered as personal estate for the purposes of the settlement," and there was no express power of sale over the lands so to be purchased, but there was a power to vary the investments of the settled personalty. *Held*, that the trustees had a power of sale over purchased land: *Tait* v. *Lathbury* (1865), L. R. 1 Eq. 174.

Aliens.

In *Master* v. *De Croismar* (1848), 11 Beav. 184, where the husband and some of the children were aliens, it was held that realty, becoming, by virtue of a covenant to settle after-acquired property, subject to trusts similar to those of personalty, must be sold; but this would not now be necessary as an alien can now acquire, hold and dispose of land in the same manner in all respects as a natural born British subject: Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2.

Where by marriage articles the husband covenanted to settle his estate, subject to raising by any ways or means that he should think proper the sum of 15,000*l.* by mortgage or otherwise. *Held*, that he might raise the 15,000*l.* by sale: *Tasker* v. *Small* (1834), 6 Sim. 625.

Power to give receipts.

Where a power of sale ought to be given to the trustees, a power to give receipts would formerly also be given to them: *Turner* v. *Sargent* (1853), 17 Beav. 515. But where on the construction of a will a power of sale by the tenant for life was to be inserted in the settlement, he was not allowed a power to give receipts: *Cox* v. *Cox* (1855), 1 K. & J. 251. The power to trustees to give receipts can now be omitted, in reliance on the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 36; and the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20.

Power to vary securities.

A power to vary securities was inserted in *Sampayo* v. *Gould* (1842), 12 Sim. 426.

Partition.

A power to partition would be inserted if a share only were settled: *Hill* v. *Hill* (1834), 6 Sim. 136 at p. 145.

Powers of leasing.

In *Hill* v. *Hill* (1834), 6 Sim. 136, Shadwell, V.-C., was of opinion that a direction to settle authorised the insertion of (*inter alia*) "powers of leasing, . . . and where there . . . are any mines, or any land fit for building purposes, powers of leasing mines, and of granting building leases," such powers being beneficial to all parties. But where the articles stipulated for a power to lease for twenty-one years, and all other usual powers, it was held that the insertion of a power to grant building leases for a longer term was not authorised: *Pearse* v. *Baron* (1821), Jac. 158.

Where the articles (on a marriage in Scotland) stipulated that a settlement of estates in Ireland should contain "all the covenants, provisions and conditions usually contained in marriage settlements made in England," and the draft settlement contained powers to grant building, repairing and mining leases, a reference was ordered to inquire whether the proposed powers were common in that part of Ireland in which the estates were situate: *Duke of Bedford* v. *Marquess of Abercorn* (1836), 1 My. & Cr. 312.

Powers of granting mining leases.

In a settlement of personal property, the parties covenanted to settle all future-acquired property upon the same trusts, &c., and subject to the same powers, &c., or as near thereto as the nature and tenure of the property would admit. *Held*, that this covenant authorised the insertion in the settlement of subsequently-acquired freeholds, of a power to grant mining leases, the prior owner having granted such leases, though the mines had never been

effectually worked under them: *Scott* v. *Steward* (1859), 27 Beav. 367.

Maintenance, education, and advancement.

Powers of maintenance, education, and advancement, were directed to be inserted in the settlement in *Turner* v. *Sargent* (1853), 17 Beav. 515, where by codicil the testator directed as follows:—"I further direct that all the property, real or personal, given in my said will to my daughter J., shall be so settled, to the exclusion of her present or any future husband, that the same may belong to my said daughter during her life, and be secured for the benefit of her children, if more than one, equally, after her death, so that the issue of any such child dying in my daughter's lifetime may take his or her parent's share."

Power to appoint new trustees.

A power to appoint new trustees was inserted in *Lindow* v. *Fleetwood* (1835), 6 Sim. 152; and in *Sampayo* v. *Gould* (1842), 12 Sim. 426, where the contract of marriage was drawn up in the Portuguese language and executed according to the law of Portugal, where the parties were residing, and contained a statement that the parties wished that it should be regulated, made binding, and carried into full and complete effect under the laws of England. A like power was inserted in a settlement made in pursuance of the directions contained in a will in *Turner* v. *Sargent* (1853), 17 Beav. 515.

Powers to portion or jointure.

On the other hand powers to charge portions: *Higginson* v. *Barneby* (1826), 2 S. & S. 516; *Grier* v. *Grier* (1872), L. R. 5 H. L. 688; or to jointure: *Duke of Bedford* v. *Marquess of Abercorn* (1836), 1 My. & Cr. 312; are not inserted in the absence of special directions. But in *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543, the insertion of these powers was under special circumstances authorised.

Articles and settlement both before marriage, settlement controls.

If marriage articles and a settlement are both made before marriage, the settlement will be considered as superseding the articles, unless the settlement be expressly stated to have been made in pursuance of the articles, or unless it can be otherwise shown that the settlement was intended to carry out the articles, and that any difference between the two instruments has arisen by mistake: but if the articles are made before, and the settlement after, marriage, the articles will control the settlement.

Articles before, and settlement after, marriage, articles control.

"Where articles are entered into before marriage, and settlement made after marriage different from those articles (as if by

articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement; but where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles. And although in the case of *West* v. *Errissey* (1726), 2 P. Wms. 349; (1727) 1 Bro. P. C. (Toml. ed.) 225, the articles were made to control the settlement made before marriage, yet that resolution no ways contradicts the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the marriage articles, whereby the intent appeared to be still the same as it was at the making of the articles:" per Talbot, C., *Legg* v. *Goldwire* (1733), Ca. t. Talb. 20. In *Honor* v. *Honor* (1710), 1 P. Wms. 123; *West* v. *Errissey* (1726), 2 P. Wms. 349; 1 Bro. P. C. (Toml. ed.) 225; and *Roberts* v. *Kingsly* (1749), 1 Ves. Sen. 238, where, although the settlement was made before the marriage, it was expressly stated to be made in pursuance of the articles; and in *Randall* v. *Willis* (1800), 5 Ves. 262, where the settlement was made after the marriage; it was held that the settlement must be controlled by the articles.

In *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558, on app. from 20 Beav. 250, Lord Cranworth, C., says (at p. 568):—"The doctrine now is, that when a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, there no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles, yet, if it can be shown that the settlement was intended to be in conformity with the articles, yet if there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the Court will reform the settlement and make it conformable to the real intention of the parties."

Where the only evidence of the articles was a recital, not purporting to give the *ipsissima verba* of the articles, in a post-nuptial settlement, it was held that the settlement, and not the articles as recited, was the controlling document: *Mignan* v. *Parry* (1862), 31 Beav. 211.

Exception.

Where, under a settlement made after marriage, an adult takes a smaller interest than he would have taken under the articles, the presumption is that the variance was made purposely, unless the settlement is expressly made in pursuance of the articles: *Partyn* v. *Roberts* (1756), 1 Amb. 315.

Letter followed by articles.

Where a letter by a lady's father, stating what her fortune would be, was followed by articles for the settlement of part only of the property mentioned in the letter, the articles were alone held binding: *Re Badcock, Kingdon* v. *Tagert* (1880), 17 Ch. D. 361.

Specific performance of marriage articles.

Specific performance of marriage articles can be obtained by the wife or the children of a marriage against any person who has contracted to make provision for them, though some other person who has contracted to make provision for them has made default in doing so: *Perkins* v. *Thornton* (1741), 1 Amb. 502; *Harvey* v. *Ashley* (1748), 3 Atk. 607 at p. 611; *Crofton* v. *Ormsby* (1806), 2 Sch. & Lef. 583 at p. 602; *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192; *Campbell* v. *Ingilby* (1856), 21 Beav. 507 at p. 567.

CHAPTER XXXV.

DEEDS TO WHICH FOREIGNERS ARE PARTIES.

Deeds Relating to English Land: Intention of Parties determines Law applicable to Construction of Deeds: Intention declared in Deed: Law generally Applicable is Law of Place where Deed Executed, unless Situation of Property, Form of Deed, or Invalidity of Provisions thereof by such Law shows Contrary Intention: Law generally Applicable to Marriage Contracts is Law of Matrimonial Domicile, unless Situation of Property, Form of Deed, or Invalidity of Provisions thereof by such Law shows Contrary Intention: Capacity Determined by Law of Domicile.

Deeds relating to English land, whether freehold or leasehold, in English form are construed by English law: *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614; but questions frequently arise as to the national law by which the construction of deeds and contracts relating to property other than land, and of marriage settlements of personalty, made between parties of different nationalities is to be regulated.

The true rule for determining the question, which is applicable to all documents, is—

Law applicable is determined by intention of parties.

> "The intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed:" per Lord Lindley, *Spurrier* v. *La Cloche*, [1902] A. C. 446 at p. 450.

Of course this intention can be shown, and indeed often is shown, by a declaration in the document itself as to the law by which it is to be construed: *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284, but where this has not been done, the intention, in the absence of any special circumstances, as regards documents other than marriage settlements, is presumed to be that they are to be construed by the law of the place where they are made; and as

regards marriage settlements that they are to be construed by the law of the intended matrimonial domicile.

Law generally applicable is law of country where deed executed.

"It is, however, generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention:" per Willes, J., *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115 at p. 122.

Examples.

Thus where a contract was made in London between London firms for the shipment by a French company of Algerian esparto at an Algerian port, it was held that the contract was to be construed and governed by English law, and that the shippers were not excused from performing the contract by the existence of *force majeure* at the French port, though such would have been a good defence according to French law: *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589; and a charter-party on an ordinary English printed form, negotiated and made in London between the London broker of a domiciled German and merchants in London for a voyage of the German's ship, was construed by English law: *The Industrie*, [1894] P. 58.

A contract having been made in the South African Republic by an English company carrying on business in South Africa with an English servant resident in the South African Republic for the performance by him of services in South Africa, it was held that the contract, though made in English form, was governed by the law of the South African Republic: *South African Breweries, Ltd.* v. *King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273.

Circumstances show ingi ntention that another law should apply.

The following circumstances have been held to show an intention that the contract should be governed by a law other than that of the place where the contract is made:—(i.) The fact that the property is situate elsewhere; (ii.) the fact that the form of the contract is that of another country; (iii.) the fact that certain stipulations in the contract would be void according to the law of the country where the contract is made.

Situation of property.

Thus the extent of an authority given by a foreign power of attorney intended to be acted upon in England must be determined

by English law: *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79.

Form of deed.

A fire policy of an English company, made in Jersey on chattels in Jersey assuring money to be paid in Jersey out of the funds of the company, in the English language and form, and containing a reference to the English Arbitration Act, was held to be governed by the law of England, and not by that of Jersey: *Spurrier* v. *La Cloche*, [1902] A. C. 446; and a marine policy in English form, but executed in Sweden, providing that the parties in case of dispute agree to be bound in all things by the jurisdiction and decision of the English Law Courts, is to be construed by English law: *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384 at pp. 394–396.

Invalidity of provisions by law of place where deed executed.

The fact that certain stipulations in the deed are valid by the laws of one country only, shows that the law of that country is that by which the contract is to be governed. Thus a contract, made in America between an American citizen and an English company for carrying cattle from America to England in a British ship, containing a stipulation that the company should not be liable for the negligence of the master or crew of the ship, such stipulation being good by English law but invalid by American law, is governed by English law: *Re Missouri Steamship Co.* (1888), 42 Ch. D. 321.

And where a contract between an English and a Scots firm, signed in England but to be performed in Scotland, contained a stipulation for reference of disputes to two unnamed members of the London Corn Exchange (which by Scots law was inoperative, the members not being named), it was held that the contract was governed by English law: *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202.

With regard to marriage settlements—

In marriage settlements law generally applicable is that of intended matrimonial domicile.

> "As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of the marriage:" per Cozens-Hardy, L.J., *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573 at p. 587.

An ante-nuptial contract in the Scots form executed in Scotland by persons domiciled in Scotland, and residing there after their marriage, is construed by Scots law: *Anstruther* v. *Adair* (1834), 2 My. & K. 513; *Williams* v. *Williams* (1841), 3 Beav. 547; and a settlement in the Scots form executed in England by a husband

domiciled in Scotland and a wife domiciled in England, who resided after marriage in Scotland, is construed by Scots law: *Duncan* v. *Cannan* (1854), 18 Beav. 128; on app. (1855) 7 D. M. & G. 78; and a settlement in French form executed in France by persons domiciled in England, but residing in France, and intending to reside there subsequently to the marriage, was construed by French law: *Este* v. *Smyth* (1854), 18 Beav. 112; and a settlement in English form executed in England by a domiciled Turk and a domiciled English woman who intended to reside subsequently to the marriage in England was construed by English law: *Colliss* v. *Hector* (1875), L. R. 19 Eq. 334.

Circumstances showing intention that another law should apply.

The following circumstances have been held to show that the settlement is to be governed by a law other than that of the matrimonial domicile, viz., (i.) the fact that the property comprised in the settlement is English realty, (ii.) the form of the limitations of the settlement, (iii.) the invalidity of its provisions according to the law of the matrimonial domicile.

Situation of property.

If the settlement is of English land and in English form, it will be construed by English law. Thus, where a settlement was made in Scotland, by a domiciled Englishman resident in Scotland on his marriage with a domiciled Scotswoman, of English real estate in English form, it was held that the construction of the deed was to be determined by English law: *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614.

Form of deed.

And a settlement made in the English form, and apparently executed in France, on the marriage of a domiciled Frenchman with a domiciled Englishwoman, who subsequently to the marriage resided in France, was construed by English law: *Watts* v. *Shrimpton* (1855), 21 Beav. 97; *Van Grutten* v. *Digby* (1862), 31 Beav. 561; *Re Megret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547.

And a contract of marriage in the Scots form made on the marriage of a domiciled Englishman and a Scotswoman was construed by Scots law: *Re Barnard, Barnard* v. *White* (1887), 56 L. T. 9; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

Invalidity of provisions by law of domicile.

A settlement valid according to the law of the antenuptial domicile of the wife, but invalid according to the law of her matrimonial domicile, is to be construed by the law of her antenuptial domicile, at any rate, so far as regards property situate in the *forum* of her antenuptial domicile: *Van Grutten* v. *Digby* (1862), 31 Beav. 561.

So a settlement in English form of English funds made by an Englishwoman on her marriage with an Italian (which settlement

was void by Italian law), was held to be governed by English law, and a covenant for settlement of after-acquired property contained therein was accordingly held binding on the wife: *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333.

Capacity determined by law of domicile.

But the capacity of the parties is regulated by the law of domicile: *Guepratte* v. *Young* (1851), 4 De G. & Sm. 217.

Thus where by the law of a foreign country the husband and wife have the right to revoke their marriage contract, and such right cannot be waived or lost, an English woman can, with her husband's consent, revoke a post-nuptial settlement made in the English form in pursuance of ante-nuptial articles to which she, as an infant, was a party, and which was consequently voidable by her, because on her marriage she acquires her husband's domicile, and is subject to the law of that domicile, and hence cannot effectually ratify her ante-nuptial contract: *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

INDEX.

ABROAD,
deeds executed, 630 *et seq.*, *see* DEEDS TO WHICH FOREIGNERS ARE PARTIES

ACCEPTANCE,
of estate prevents subsequent disclaimer, 20

ACCIDENT,
deed not binding on ground of, 137, 138

ACCRUED SHARES,
cross remainders of, 380

ACCRUER,
not implied, 467

ACRE,
in deed means statutory acre, 66

ACREAGE,
of parcels, wrongly stated, rejected, 220, 221

ACT OF PARLIAMENT,
as evidence of meaning of words, 63
meaning of word defined by, 66
legal terms in, evidence as to, 67
contemporanea expositio applied to, 141
debates not looked at to construe, 142
construed by usage, 148
ejusdem generis rule applied to, 231

ACTS,
of parties, not evidence to construe deed, 138
habitually done under ancient document evidence to explain it, 142 *et seq.*
"reasonable," meaning of, 567

ADDITION,
false, to parties, 180
to parcels, 220

ADDITIONAL TERMS,
implied by usage, 130

ADJOINING TENEMENTS,
grant of one of, 240, 255 *et seq.*

ADMINISTRATOR, *see* EXECUTOR

ADMISSIONS,
subsequent, not allowed to aid construction of deed, 138
of debts, by deed, may operate as covenants to pay, 198, 491

ADVOWSON,
not passed by general words when particular words not *ejusdem generis*, 230

AFTER-ACQUIRED PROPERTY, *see* COVENANTS TO SETTLE
assignment of, when construed as covenant, 508, 509, 510

AGREEMENT,
for lease, when construed as lease, 51, 52
construction of, in favour of lessee, 121, 122
for sale, void for uncertainty of subject-matter, 98
followed by receipt for purchase-money, 185
contemporaneous with, not admitted to explain, deed, 126
recital of, inconsistent with operative part, 181, 185
not under seal, sometimes called covenant, 483
under seal, amounts to covenant, 485
to execute deed which ought to contain covenants, 500
for lease or mortgage, effect of, in creating specialty debt, 500

AGREEMENT AND DECLARATION,
that party is to do an act is a covenant by such party, 492
property shall be settled binds husband and wife, 583 *et seq.*
husband (or wife) shall settle binds him (or her) only, 583 *et seq.*

AIR,
implied right to access of, when grant is for business requiring it, 269, 270

ALIENS,
becoming entitled to land under covenant to settle, 626
deeds entered into with, 631 *et seq.*, *see* DEEDS TO WHICH FOREIGNERS ARE PARTIES

ALL ESTATE CLAUSE, 271 *et seq.*
redeemed land-tax, tithes, right of entry do not pass by, 278
conveyance of, for value, 271

"ALL OTHER THE," 227 *et seq.*

ALLOTMENT,
whether passes by general words, 252

ALTERATIONS,
in deeds, presumption as to time of, 26
printed deed altered in writing, 27, 84
pencil, 27
material, by party, effect of, 31
in bonds, policies, 32, 39
in guarantee, bill of exchange, bank note, 38, 39
with consent of all parties to effect intention, 33, 34
fresh execution after, presumption as to, 37
new stamp, 37
by stranger, 37
after some of the parties have executed, 38, 39, 40
immaterial, 39 *et seq.*
fraudulent, 40
by accident or mistake, 41

AMBIGUITY,
Latent or *equivocation*, defined, 96
distinguished from inaccuracy, 97, 107, 108
how discovered, 103
evidence, extrinsic or intrinsic, to clear up, 103, 110
intrinsic to determine person or thing described, 103
direct, of intention, to resolve, 104, 107, 109, 110
rules as to, given by Wigram, V.-C., 106

AMBIGUITY—*continued.*
Patent defined and explained, 96, 97
evidence admissible to clear up, 97, 110
direct, of intention, not admissible, 98
not cleared up, makes deed or clause void for uncertainty, 98, 110
determined by election of grantee, 99
arising from inaccurate description, 110
in ancient documents, explained by usage, 142, 144
in operative part explained by recitals, 185 *et seq.*

AMBIGUOUS WORDS,
construed against person using them, 501
absolute covenant not qualified by, 542

ANCIENT DOCUMENTS,
evidence to construe, 61
of circumstances, 61
conduct, 139, 140 *et seq.*
contemporaneous interpretation, 140 *et seq.*
usage, 142, 145
modern, 143, 144
what are, 148

"AND ALL OTHER" or "AND ALSO,"
general description introduced by, 227

ANNUITY,
out of rents and profits is charged on corpus, 453
unless context shows charged on income only, 229, 454
grants of, construction of covenants in, 518, 519, 521

ANTICIPATION, RESTRAINT ON, *see* RESTRAINT ON ANTICIPATION

APPARENT EASEMENTS, 256, *see* EASEMENTS

APPENDANT,
distinguished from appurtenant, 250, 252
things, to parcels, pass without express words, 250
what are, 250, 251
advowson, to manor, 250, 284, 285
common to arable land, 250
estovers, to house, 250
always arise by prescription, 250

"APPERTAINING,"
construed as "as usually occupied with" parcels, 75, 253
will not recreate extinguished easements, 251
rights of common, 254

APPOINTMENT,
power of, execution of instrument exercising, 5
deed of, construed as grant, 49
effected by deed not referring to power, 53
by feoffment, recital, lease and release, &c., 52, 53, 119
where donee of power has also an interest, 53
operation of rule in *Shelley's case*, 325, 326
existence of power does not prevent vesting where there are express limitations in default of appointment, 447, 448
implied gift to objects of power in default of appointment, 449
where only survivors take, 450
where power is testamentary only, 450
creates tenancy in common, 449

APPORTIONMENT OF RENT,
up to purchase, parol evidence of agreement for, not admitted after conveyance, 126

APPRENTICE,
covenants by or with, whether dependent, 536, 537

APPURTENANCES,
meaning of, 253
distinguished from things appendant, 250, 251, 253
pass without express words, 249, 250
garden, or ways, to house, 138, 250
common of pasture, estovers, or turbary, to manor, 250, 251
created by prescription or grant, 250, 251
revivor of right of, 253, 254
grant of land with the, only passes what is strictly appurtenant, 252
contract for sale with the, construction of, 252, 253
may mean things usually enjoyed with parcels, 253, 254
right to use a wall, 285
in habendum construed by words in premises, 287

ARBITRATION,
agreements for, when conditions precedent, 533

ARMORIAL BEARINGS,
grant of, to A. and his heirs male, 307

ARTICLES OF ASSOCIATION,
read to explain memorandum, 78

"AS COUNSEL SHALL ADVISE," 567, 568, 611

"ASSIGN,"
word, whether effectual to revive merged term, 52

ASSIGNMENT,
cancelled, effect of, 29
covenant construed as, 51, 507, 508
implied by, 497, 498
of future property construed as covenant, 508, 509, 510
by executor, of "his" goods and chattels, 277

"ASSIGNS,"
implied by law, 112
rent reserved to, 112
hereditaments limited to A. and his, 300
in expression "heirs and assigns," mere surplusage, 301

ATTESTATION,
not necessary to validity of deed, 21
meaning of, 21
of sealing by corporation, 21

ATTORNEY,
execution by, 22
power of, explained by recitals, 190
executed abroad, 632, 633

AVERMENT,
meaning of, 98

AWARD,
is not a deed, 3
alteration of umpire's, 40
inclosure, ambiguous, evidence of acts of owners, 141
whether presumption as to ownership of river-bed applies to, 23

BANK NOTE,
alterations in, 38

BANKRUPT,
tenant in tail, mortgage by, further assurance, 566

BANKRUPTCY,
limitation to tenant for life until, 344
in marriage settlements, 344, 345

BAPTISM,
name of, 177

BARGAIN AND SALE,
construed as covenant to stand seised, 48
confirmation, 50
feoffment, 51
not enrolled, construed as grant, 49
examples of deeds construed as, 50
creating fee simple without the word "heirs, 303

BASTARD,
reputed name of, 180
covenant to stand seised to use of, 205
limitation to, "and his issue," 300
when admitted to take as "child," 419, 421
gift to, by deed, 419, 420, 421

"BEGOTTEN,"
extends to future issue, 314, 417, 418
"to be," extends to children already born, 314, 417, 418
unless controlled by context, 418

BENEFICIAL INTEREST,
of trustee, operation of conveyance on, 276

BENEFIT,
person taking, under deed, bound by deed, 22

"BESIDES,"
eldest son, 441

BILL OF EXCHANGE,
alterations in, 38, 39
patent ambiguity in, 99

BILL OF LADING,
evidence as to meaning of technical words in, 73
of usage to add implied terms to, 136

BILL OF SALE,
is avoided by untrue statement of consideration, 205

BISHOP,
manner of dating deed by, 173

BLANK,
in deed, filled up after execution, 33
transfers, 35, 36
covenant to settle property, amount left in, 602

BOND,
in form joint and several, executed by one obligor only, 19
alterations in, 32, 39
several, cancelled as to one party, 42
cases on construction of, 83, 92, 182, 191
evidence to vary, inadmissible, 126
joint and several, 513, 514

"BORN,"
includes "to be born" and *contra*, 417, 418

BOROUGH ENGLISH,
lands, gift of, by purchase, to heir, 318
limited to A "and his heirs" *pur autre vie*, customary heir is special occupant, 353
to be settled under marriage articles, 613

"BOSCUS,"
meaning of, 115

BOUGHT AND SOLD NOTE,
alterations in, 38
evidence to add implied terms to, 135

BOUNDARIES,
erroneous, of parcels rejected, 221

BREACH OF TRUST,
when a specialty debt arises on, 488

BUILDING,
contract, alterations in, 31
evidence of meaning of terms in, 72
society, receipt of, 209
estate, ownership of roads, 234, 235
covenants by purchasers of several lots, 537
land retained by vendor for, implied reservation of right of way, 265, 266

BUSINESS,
implied covenant to carry on, 494, 495, 496

"BUT THAT,"
qualifying covenant, 543

CALENDAR,
commencement of Christian era, 150
of year, 150, 151
Julian, 151
Gregorian, 151
adoption of in British dominions, 152
feast-days are new style, 152

CANCELLING DEED, *see* ALTERATIONS
effect of, 29, 30, 31
by accident, 41
seal of one party, 42

CAPABLE AND INCAPABLE PERSON,
limitation to, 393

CHARITABLE TRUSTS,
construed by usage, 141, 146
not within the Rule against Perpetuities, 390

CHARTER-PARTY,
alterations in, 32
evidence as to the meaning of expressed terms in, 72
to add implied terms to, 134, 135
"days" means consecutive days in, 163
delivery of goods, condition precedent to payment of freight, 532
covenants in, whether dependent, 539

CHARTERS, ANCIENT, 140 *et seq.*, *see* ANCIENT DOCUMENTS

CHEQUE,
erasure of crossing on, 40

CHILD,
en ventre sa mère is a life in being within the Rule against Perpetuities, 385
limitation to "A. and his eldest," 445

CHILDREN, *see* CLASS, YOUNGER CHILDREN
in deeds is a word of purchase, 427
of A., gift of realty to, not enlarged by gift over on death of A. without issue, 340
primary meaning of, 416, 417
may include other issue, 416
children of several marriages, 416, 417, 431
includes child *en ventre*, 417
"of the wife," in marriage settlement, means children by that husband, 416
younger, when children by second wife included, 416, 417
born, or living, at specified time, child *en ventre* included, 417
"to be born," "to be begotten," &c., children already born included, and *e contra*, 417
primâ facie means legitimate children only, 419
legitimate, who are, 419
illegitimate, when admitted, 419
unborn at date of deed cannot take, 420
where "issue" means, 421, 423, 424, 425, 426
"children of A. and of B." as a composite class, 444
immediate trust for "children of A.," 445
interests taken by, under marriage articles, 616 *et seq.*, 621 *et seq.*, *see* MARRIAGE ARTICLES

CHRISTIAN ERA,
commencement of, 150

CHRISTIAN NAME, 177
supplied, 86

CHRISTMAS DAY,
formerly beginning of year, 150

CHRONOLOGY, 150

CIRCUMSTANCES,
words to be construed with reference to, 56, 58, 62 *et seq.*, 415
evidence of, to construe words, 57, 58, 60
to vary deed, inadmissible, 124
to connect several deeds admissible, 128
estate of grantor regarded in construction of grant, 296

"CLAIMING UNDER,"
in covenant for quiet enjoyment, 562, 563

CLASS,
made parties by class name, 179
defined, 442, 443
vesting of gifts to, 442 *et seq.*, *see* VESTING
and named individual, 443, 444
"composite class," 443, 444
must take in interest at the same time, 444
name individual may be excluded, 444
gi tto under power of appointment, 445
opening to let in members, 446, 447

"CLEAR DAYS," 169

CLERICAL ERROR,
corrected by counterpart, 24
context, 82, 83, 88

COLLATERAL CONTRACT, 129, 130

COLLECTIVE NAME, 212

COMMON,
strips on side of road communicating with, 239
appendant cannot be created by modern grant, 251
extinguished, when right of revived, 253, 254
rights of, extinguished by enfranchisement, 254
over customary freeholds not extinguished by release of seignorial 254
none passed by grant of lord's demesne "with all commons thereto belonging," 255

COMPOSITE CLASS, 443, 444

CONCEALED DEED, 14

COMPANY, *see* CORPORATION
joint-stock, implied covenants by, 499

CONDITION,
words of, amounting to covenant, 485
precedent to performance of covenant, 522, 525, 526, *see* COVENANTS, MUTUAL
arbitration as, 533

CONDITIONAL FEE, 307, 308
in copyholds, 308

CONDITIONS OF SALE,
not admitted as evidence to restrict parcels in conveyance, 126 (*and see* CONTRACT)

CONDUCT,
subsequent, of parties, not evidence to aid construction of deed, 138
evidence to explain ancient documents, 139, 142, *et seq.*

CONDUIT,
when passes as "appurtenance," 253

CONFIRMATION OF TITLE,
construction of deed for, 193

CONSIDERATION,
proof of, when not stated, or incorrectly stated, 128, 201, *et seq.*
illegal, 138
additional, 201, 202, 203
valuable, 202
covenant may be, 202
illegal, effect of, 200
general, use not raised upon, 201
created by conveyance for life or in tail, 204
conveyance without, resulting use, 204, 373
evidence by whom paid admissible, 205
what, necessary to raise use, 205
one covenant being, for another 534

CONTEMPORANEOUS
declarations of parties as to intention, not evidence, 61
documents, as evidence, of meaning of words, 63
deeds, how construed, 78
presumption as to order of execution, 79
evidence as to their referring to the same transaction, 129
interpretation of ancient documents, 140 *et seq.*
sales, rights as to easements, 271

CONTEXT,
to be regarded in construing words, 57, 60, 62, 152
excluding literal meaning, 62, 75, 327, 421
discriminating between several literal meanings, 103
words supplied, rejected, or transposed, on, 82 *et seq.*, 301, 310, 314, 418
And see EVIDENCE, INTRINSIC

CONTINGENT REMAINDERS,
limitation to heirs of living person not grantor, 319, 322
in heirs of body, 322, 323
in "heir," or heir of body, as purchaser, 328
whether the Rule against Perpetuities applies to, 387, 388
after estate tail, good because barrable, 387
good if they must vest, if they vest at all, within a life in being and 21 years, 387
although limited to a person who could not have taken by way of executory limitation, 387
bad if limited to arise on an event which may be too remote, 388
limitations which can take effect as, not construed as executory limitations, 389

CONTINUOUS EASEMENTS, 255, *see* EASEMENTS

CONTRACT, *see* MERCANTILE CONTRACTS, AGREEMENT, COVENANT
executory, followed by deed, 125
not admitted as evidence to vary conveyance, 126, 127
collateral, 129
evidence to add implied terms, 130 *et seq.*

CONTRADICTION, 82 *et seq.*, *see* REPUGNANT

CONVEY,
covenant for right to, 548, 552
trust or direction to, not necessarily executory, 611

CONVEYANCE
executed but not handed over, 13, 14
contract, map, etc., not admitted to explain, 127
by partners, whether separate estate passes, 183
concurrence in, to cure objections to title, 193
without consideration, 204, 373
schedule or inventory held restrictive, 188, 217, 218
map or plan, incorporation of, 219, *see* MAP
not construed so as to work forfeiture, 231, 232
of part of tenement, rights as to easements, 255 *et seq.*, *see* EASEMENTS
for railway, or other special purposes, 259, 268, 269
of all estate, right title or interest, 271
whether condition precedent to payment of purchase-money, 526, 527, 530, 539

CONVEYANCERS,
practice of, evidence to construe deeds, 68

COPARCENERS,
release between, without the word "heirs," 303
rents reserved to, go in coparcenery, 395

COPYHOLDS,
surrender to take effect *in futuro*, 81
whether passed by assurance proper to convey freeholds, 231, 232
whether uninclosed strips and roads included in grant of, 239
re-grant of forfeited, no revivor of common appurtenant, 253, 254
estate of inheritance in, created by customary ssurance without the word "heirs," 304
fee-simple conditional in, 308
limited in remainder to heirs of grantor, 320
Rule in *Shelley's Case*, 325

CORPORATION,
delivery of deed by, 9, 13
debentures by, 11
attestation of sealing by, 21
name of, as party to deed, 177, 179
by what words a fee-simple is limited to, 302
limitations to two, tenancy in common, 394
and a natural person, 394

CORPORATION SOLE
by what words a fee-simple is limited to, 299, 302, 304, 305
term cannot be limited to, so as to vest in successors, 299

COUNSEL,
"as counsel shall advise," 567, 568, 611

COUNTERPART, 24
correction of error in original by, 24

COVENANT, *see* COVENANTS JOINT AND SEVERAL, COVENANTS MUTUAL, COVENANTS QUALIFIED, COVENANTS TO SETTLE
meaning of word, 483
when applied to instruments not under seal, 483
may include proviso, 483, 485, 486
agreement under seal must amount to, 485
man cannot, with himself, 511
stipulation negativing obligation is not, 487, 488
executed and executory, distinguished, 484
several, where seal of one party cancelled, 42
creation of, no special form of words necessary, 484
but they must amount to binding agreement, 484, 485
created by admission under seal, 198, 491
assignment of future property, 508, 509, 510
declaration by A. that he will do a thing, 486
declaration of trust in deed executed by trustee, 488
exception, words of, 486
participle, 486
proviso, 485, 487
recital, 198, 488 *et seq.*
of intention that thing shall be done, 489
that a state of facts exists, 489
restriction by way of use, 487
"to be," 486
"upon condition," "I will be ready to," 485
"yielding and paying," or "rendering" rent, 486
"excepting," "being," "doing," 486
warranty, 485
agreement and declaration, 487
followed by statement that one is to act, 492
to execute deed that ought to contain covenants, 500
not created by recital which has another object, 491
assignment of lease, "subject to" rent and covenants, 487

COVENANT—*continued.*
operating as conveyance, 50, 51, 507, 508
lease, 51, 52
grant of easement or profit *à prendre*, 49, 241
release, 50, 510
absolute, not cut down by recitals, 183, 585
exception to, how construed, 501
ambiguous, construed against covenantor, 501, 550
by recital, 190, 191
interest of covenantees or circumstances, 516, 517
construction of, not according to interpretation put on it by parties, 501
for renewal according to usage, 138, 147
by lessor or lessee, 120, 121
trustee as not personally binding, 116
father to settle, resulting trusts, 377
"to pay on 29th February then next," 176
to observe covenants and indemnify covenantee, 511
illegal, void unless severable, 502
in law, what, 498
implied, restricted or excluded by express, 117, 500
to effectuate intention of parties, 492, 493
from whole deed, 493, 494
relationship of landlord and tenant, 499
by word "demise," 117, 498, 499
"give," "grant," 498
"let," 499
by assignment, 497, 498
by law, whether liability under, is joint or several, 515
in conveyance by joint-stock company, 499
under Lands Clauses Act, 498, 499
Yorkshire Registry Act, 498
under Conveyancing Act, 1881, 499
to carry on business, 494, 495, 496
not implied from whole deed, 495, 496, 497
penalty, effect of, 502, 503, 504
or liquidated damages, whether sum named to secure performance is, 505, 506
difference as to amount recoverable, 505
payment conditioned on one event is damages, or more than one is penalty, 506
recovery of, is satisfaction of the covenant, 507
proviso cutting down liability of covenantor, 501, 502
qualification of covenant by participle or "to be," 488
specific performance of, when secured by a named sum, 502, 503
not to revoke a will, 511

COVENANT AGAINST INCUMBRANCES
extends to incumbrances of which covenantee has notice, 563

COVENANT FOR FURTHER ASSURANCE
only extends to estate conveyed, 563
whether purchaser could require fine, recovery, or surrender, 564, 565
covenantee's right may depend on nature of estate conveyed, 565
where professedly limited interest is sold, 565
purpose of the covenant, 564, 565
effect of, as other covenants are general or limited, 565
tenants in tail, further assurances by, 566, 567
estate tail of bankrupt mortgagor, 566
specific performance, 566
interest acquired by covenantor since conveyance, 566
none where original conveyance void, 568
whether purchaser can require duplicate conveyance, 567
or covenant to produce, 567
or fresh covenant for title, 567
agreement to convey distinguished from, 567
where time for performance is limited, 568

COVENANT FOR FURTHER ASSURANCE—*continued.*
doctrine of estoppel as to subsequently acquired interest, 568, 569
"reasonable acts," means necessary and practicable, 567
"as counsel shall advise," 567, 568

COVENANT FOR QUIET ENJOYMENT, *see* COVENANTS, QUALIFIED, DISTURBANCE
object of, 548, 553
restricted by recital, 560
broken if property in lease, 553
not guarantee for unrestricted user, 553, 554
whether broken by legal proceedings, 554
whether broken by suit in equity, 555
"disturbance," &c., must be lawful, 560
but covenant may be so worded as to extend to tortious acts, 560
against acts of covenantor himself, &c., 560, 561
against acts of specified persons, 561, 562
disturbance by covenantee's own act, 559
construction of special words, 556
"clear of rents," "during the term," 556, 557
"acts," "means," &c., 557
"means, procurement, consent," 557, 558
"neglect," "default," 557, 558
"grants, rent-charges," 558
"permit and suffer," dower trustee, 558, 559
"suffer," entry under elder title, 559
who are persons "claiming under" covenantor, 562
appointee under prior power, 562
prior mortgagee with concurrence of covenantor, 562
tenant in tail under settlement by covenantor, 562
resettlement, appointee under, 562, 563
widow in respect of dower, 563
superior landlord is not, 563
where covenant prospective only, 555, 556
worded so as to extend to past acts, 556
distress for land tax due before demise, 563
quit rents accrued before conveyance, 558
quit rents accrued after conveyance, 558
things appurtenant or incident, 556
where covenantor neglects act to confirm his title, 557, 558
charging order, 559

COVENANTS FOR TITLE, *see* COVENANTS, QUALIFIED
what are, 547, 548
are construed against the covenantor, 120
are either general or limited, 547, 548
not limited by the fact that defect appears in recitals, 183
and right to convey compared, 548
and covenant for quiet enjoyment distinguished, 548, 549
covenant for right to convey, extends to both title and capacity, 552
covenants for seisin and right to convey, 549, 550
covenants by vendor entitled by descent or devise, 550
distinction between freeholds and leaseholds, 550
covenant that lease and term are in full effect, &c., 551

COVENANTS, JOINT AND SEVERAL, 512
benefit of, may be joint or several, but not both, 512
whether joint or several, 515 *et seq.*
a question of construction, 516
when words are ambiguous, 516
liability under, may be joint or several, or both, 512
how determined, 512
where separate liability existed before covenant, 514
each covenants for his own acts, 513
under covenants implied in law, 515

COVENANTS, JOINT AND SEVERAL—*continued.*
joint, made joint and several by introductory words, 546, 547
where one of several covenantees has no beneficial interest, 520

COVENANTS, MUTUAL, 522
dependent and independent distinguished, 522
dependency a question of construction, 522, 523
not necessarily created by technical words or order of covenants, 523
arising from time for performance, 524, 531
where covenants have to be formed simultaneously, 529
arising from nature of covenants, 534, 535
as consideration does or does not go to root of contract, 534, 535
where defendant has had substantial part of the consideration, 536
where clauses are introduced by participles or "to be," 539
covenants, whether independent, to build, 527
to repair, 539
to settle, by wife's father and husband, 529, 531
to supply goods, 531, 532, 538
charter-party, 532, 533
arbitration, 533

COVENANTS, QUALIFIED, 541 *et seq.*
by context, 541
participle or the words "to be," 488
not by ambiguous words, 542
by "but that," 543
words in other covenant, 543, 544
position of qualified covenant immaterial, 543, 544
rules by Lord St. Leonards as to the qualification of one covenant by another, 544
qualification of one covenant affects all others *in pari materia*, 545, 546
for title and right to convey, 548, 549, 550
qualifying words rejected by context, 542, 543
covenant to repair qualified by context, 541, 547
to renew, whether affected by other qualified covenants, 545
in dispari materia, 545
for title and quiet enjoyment, 546, 552
and value, 547
for validity of lease and quiet enjoyment, 551, 552
and against incumbrances and for further assurance, 552
to pay annuities or rents and to indemnify against them, 547
to repair and leave repaired, 547

COVENANTS IN RESTRAINT OF TRADE, Chap. XXXII. pp. 570 *et seq.*, *see* RESTRAINT OF TRADE

COVENANTS TO SETTLE PROPERTY, Chap. XXXIII., pp. 579 *et seq.*
construed by recitals, 190
effect of judicial separation as to, 413
covenantor acquiring a different interest from that mentioned in covenant, 580, 581
agreement that one party shall settle, only binds that party, 581, 582, 583, 584, 585
property shall be settled, binds both, 581, 582, 583, 584, 585
covenant by husband only, 582, 583
does not bind wife's separate estate, 582
reversionary property, 582
equitable choses in action, 582
covenant by wife only, 582, 583
binds her separate property, 582
unless settled without power of anticipation, 583
operative part if clear not restricted by recitals, 184, 585
agreement by husband and wife and covenant by husband, 585, 586, 587
covenant by husband to settle all his after-acquired property, "except business assets," 587

COVENANTS TO SETTLE PROPERTY—*continued.*
do not extend to life-interests, or income, 587, 588
property subject to power of appointment, 588
unless covenantor appoints to himself, 588
"*Spes successionis,*" 591
covenant to appoint to trustees under power exerciseable by will only, 589
"is now entitled," or "at date of marriage shall be entitled," includes reversionary interests, 589
"shall become entitled" means during coverture, *quâ* wife's property, 590
contra quâ husband's property, 590, 591
Property described by words of future acquisition only
not caught unless some change in title or fresh acquisition of interest, 592
property of wife in possession at date of settlement, not bound, 593, 594
husband's acquisition of interest in wife's property, 594, 595, 596
vested reversion not falling into possession during coverture, not bound, 595, 596
falling into possession during coverture is bound, 597, 598
contingent interest falling into possession is bound, 598, 599
vesting in interest only, how affected, 599
not vesting in interest or possession, not bound, 599
Property to which the covenantor has no title, described by words of future acquisition
if acquired in possession, is bound, 600
but not if acquisition is only change of investment, 600
exception not implied, 600
gift from husband to wife, 600, 601
estate tail, 601
if acquired in reversion, is bound, 601
reversionary interest liable to be divested by exercise of power, 601
if acquired in contingency, is probably bound, 602
Property of named minimum value
"value" means value when property falls into possession, 602
after deducting duties, 602
"at any one time," how construed, 602, 603
successive appointments of several sums, 603
increase of value after coverture determined, 603
Married Women's Property Act, 1882
does not affect settlements, 603, 604, 605
effect of, on covenant by husband to settle property of infant wife, 606
property given with direction that it is not to be bound, 604, 605
restraint on anticipation, effect of, 605
interests determinable on alienation, not bound, 605
joint tenancy severed by, 606
by infant wife, 606
confirmation, 606
not enforceable by volunteers, 606
covenant to leave property by will, 607
creates specialty debt, 607
if performed makes covenantee a legatee, not a creditor, 607
legacy may lapse, 607
may create a charge, 608
covenant to settle personalty by reference to realty, 620
to settle realty by reference to personalty, 619

COVENANTS TO STAND SEISED,
examples of deeds construed as, 47, 48
construed as bargain and sale, 50
as lease, 51
as exercise of power to jointure, 53
consideration necessary, 201, 205

COVENANTS TO STAND SEISED—*continued.*
uses limited to stranger, void, 205
powers in, of appointment, leasing, revocation, 205, 206
made with strangers, 206
in favour of husband or wife of relation, 206
by tenant in tail, 363

COVERTURE,
deed may not be binding owing to, 137
trusts for wife during, extended to life, 377
in marriage settlements refers only to marriage then intended, 412

CREDITORS,
made parties by class description, 179

CREDITORS' DEEDS,
alterations in, 32, 40
doctrine of *ejusdem generis* applied to, 228, 231
recital creating covenant in, 490

CROSS REMAINDERS,
not implied in deed, 377, 378
except in executory deed, 381, 616
of accrued shares, 380
"survivors" read "others," to raise, 381, 382
inserted in settlement under articles, 616

CROWN,
grant by, taken most strongly against grantee, 122
ambiguity in, 101
to "A. and his heirs male," void, 306
limitations to, *see* KING

CUSTOM, *see* USAGE
evidence of, to add implied terms to contract, 130, 131
where party ignorant of custom, 137
to explain express terms, 57 *et seq.* 131

CYPHER,
evidence as to meaning of, 65

DAMAGES, LIQUIDATED, 505 *et seq.*

DATE,
deed takes effect from delivery not from date, 9, 128, 173
of delivery of deed, evidence to prove, 127, 128, 174
impossible, erroneous, or none, 175
reference to, how construed, 175, 176
computation of time *from* a, 163 *et seq.*
commencing *on* a, 166
"29th February next ensuing," 176

DATING
of mediæval documents, 150

DAY
usually means 24 hours, commencing at midnight, 159, 162
but context or evidence may indicate other meaning, 162
fractions of, disregarded, 159 *et seq.*
unless it is necessary to distinguish, 161
"now last past," 174
"days" in charter-parties means consecutive days, 163

DEATH,
gift over in case of death before share payable, 473, 474
without leaving children, 478, 479, 480
of all children in parent's lifetime, 478

DEATH WITHOUT ISSUE, Chap. XVII., pp. 337 *et seq.*
words "die without issue" mean failure of issue at any time, 337
at a specified age, 337
meaning "without leaving children," 338
"or" without issue read "and," 340
gift over on, following limitation to A. and his heirs, 311, 338
does not enlarge express estate for life, 339
default of "such" issue, or without "leaving issue," 339
life estates of children not enlarged by, 340
following limitations of personalty, 340
of personalty for A. and heirs of his body, 335

DEBITUM IN PRÆSENTI, SOLVENDUM IN FUTURO, 464

DEBT,
admission or recital under seal operating as covenant to pay, 198, 491

DECLARATIONS, *see* Agreement and Declaration
vesting property in new trustees, 303
covenants created by, 492
subsequent, of party cannot vary deed, 138, 139

DEED, *see* Alterations, Attestation, Ancient Documents, Contemporaneous, Repugnant, Escrow
what constitutes, 3
may be in any language, 4
in print, 4
in a book, 4
read over to a blind man, 4, 5
need not be signed, 5
must be sealed, 6
delivery essential to, 8
sealing and delivery, presumption as to, 21, 173
takes effect from delivery, 9, 173
retained in grantor's possession, 13, 14
effective though concealed, 14
delivered as an escrow, 15 *et seq.*
executed by A. in faith that B. will execute, 19
by A. personating B., 22
execution of, exercising a power, 5
by a trading corporation, 13
by a lunatic, 21
by attorney, 22
not executed by grantee binding on him if he takes the benefit, 22
enrolment of, 22
indented and deed poll, 22
made *inter partes* cannot be sued upon by a person not a party, 23
deed poll can be sued upon by covenantee, 24
schedule annexed after execution, 32, 40
not taking effect as intended construed so as to carry out expressed intention, 46 *et seq.*
every part of, to be regarded, 45, 75, 76
when transaction is contained in more than one, 78
presumption as to order of execution, 79
construction of, may be affected by unnecessary words, 115
specific statement prevails over general, 117
construed most strongly against grantor, 117
made to carry out executory contract, 125, 628
will not looked at to construe deed, 127
when only part of contract expressed in, 128

DEED—*continued.*
indorsement, taken as part of, 128
not binding, extrinsic evidence of fraud, &c., 137
not varied by subsequent admissions or conduct, 138
how dated, 173
premises of, what are and office of, 200, 279, *see* PREMISES
habendum, 279, 280, *see* HABENDUM
whether construed differently from will, 332, 370, 424, 459, 464, 465, 475, 610, 611

DEEDS TO WHICH FOREIGNERS ARE PARTIES, Chap. XXXV., pp. 631 *et seq.*
deeds relating to English land construed by English law, 631
intention of parties determines law applicable to construction, 631
law of place where contract is made presumed to apply, 632
presumption may be rebutted by
1. situation of property, 632
2. form of contract, 632, 632
3. inclusion of terms invalid by that law, 632, 633
marriage settlements presumed to be governed by law of matrimonial domicile, 633
presumption may be rebutted by
1. settled property being English realty, 634
2. form of settlement, 634
3. inclusion of provisions invalid by that law, 634
capacity of parties governed by law of domicile, 635

"DEFAULT"
in covenant for quiet enjoyment, 557, 558

DEFAULT OF HEIRS
gift in, to person in line of descent cuts down prior estate in fee to tail, 311

DEFAULT OF ISSUE, 386, *see* DEATH WITHOUT ISSUE

DEFEASANCE, 128

DELIVERY
essential to a deed, 8
deed takes effect from, 9
of deed by corporation, 9, 13
of debentures, 11
what is sufficient, 11
insufficient, 11
estops parties, 17

DEMESNE
grant by lord of part of, does not pass to grantee right of common, 255

DEMISE, *see* LEASE
what words operate as, 51
till a certain sum be paid, 343
covenants implied by word, 498, 499
restricted by express covenant, 117, 500
when qualified, 546, 551, 552
liability under, whether joint or several, 515

DESCRIPTION, *see* AMBIGUITIES, GENERAL DESCRIPTION, INACCURACIES, PARCELS, PARTIES, SPECIFIC DESCRIPTION

DETERMINABLE FEES, 307

DICTIONARY,
evidence of meaning of words, 63, 65

DIRECT EVIDENCE OF INTENTION,
inadmissible to construe language of deed, 61
what is, 104, 105
not admissible to explain patent ambiguity, 98
in cases of inaccuracies, 109, 110
admissible to resolve equivocation, 104
does not contradict deed, 105
not admissible to make out tenancy in common, 396

DISCLAIMER,
effect of, 19, 20
none possible after acceptance, 20
estate vests until, 19, 20

DISENTAILING DEED,
operation of, restricted to estates tail specifically dealt with, 275
whether, can be called for under covenant for further assurance, 566, 567

DISTANCE,
how measured in construing covenant in restraint of trade, 577

DISTRIBUTION,
words of, added to limitation of inheritance, 577

DISTURBANCE,
meaning of in covenant for quiet enjoyment, 554, 555, 560, 561, 562
suit in equity is, 555
damage by water or drains is, 555
unless accidental, 555
inconvenience caused by painting is, 555
injury to particular goods by ordinary user of rest of house is not, 555
causing chimney to smoke by building up adjoining house is not, 555
committing nuisance on own land is not, 555
must be by act subsequent to grant, 555, 556
caused by covenantee's own act, not a breach, 559
means lawful disturbance, 560
unless by covenantor himself, 560, 561
or by named person, 560, 562

DITCHES,
ownership of, 238

DIVESTING,
of estate, none by subsequent destruction of deed, 29 *et seq*
of portions, *see* PORTIONS

DIVORCE,
gift over in post-nuptial settlement in case of, 343, 344
effect of, as to ultimate trusts in settlement, 412

DIVORCED WOMAN,
name of, 178
re-marriage of, during life of first husband, whether separate use revives, 349

DOWER,
barred by effect of recital, 190
man's widow "claims under" him in respect of, 563

DRAFT,
cannot be read to construe deed, 125, 126, 127

DRAINAGE,
easement of, 257, 264, 268

DURESS,
evidence to show deed not binding for, 137, 138

EASEMENTS, *see* WAY
grant of, effected by articles of agreement under seal, 49
by covenant, 49, 241
by what words, 241
must be by deed to make them appurtenant to land, 251
continuous and apparent, necessary, pass by implication on grant of part of tenement, 255
whether implied reservation of, to vendor, 264
rights as to on contemporaneous sales, 271
"apparent," what are, 256
"necessary," what are, 256
of necessity, definition of, 256
drainage, 257, 264, 268
light, 257, 258, 269, 270
water, 258
discontinuous, 256, 259
formerly appurtenant, extinguished by unity of ownership, 251
reciprocal, implied grant and reservation of, 264, 271
support, 258, 259, 264, 268
revivor of, 260
implied, to be enjoyed with house not yet built, determined at time of contract, not time of conveyance, 270

EJUSDEM GENERIS,
doctrine of, 227
applied to parcels, 228
personal property, 228
mortgages, 229
power of attorney, 230
fixtures, 230
reversion, 230
statutes, 231
exceptions to rule, 231

ELDEST SON, *see* PORTIONS
primary meaning of, 429
meaning eldest by birth, 439, 440
child succeeding to estate, 430
in provisions for younger children, where reference to provisions made for eldest, 430
no such reference, 439, 440
tenant for life only, 434
not succeeding to estate takes portion, 432, 433
limitation to "A. and his," 445

ELECTION,
by grantee, when deed may enure to divers purposes, 54
in cases of patent ambiguity in subject-matter, 99 *et seq.*
by grantor, under exception, 102
none against the King, 123
wife to confirm covenant to settle made by her while infant, 606

ENFRANCHISEMENT,
extinguishes rights of common, 254

ENROLMENT,
may be completed after death of grantor, 22

ENTIRETIES,
tenants by, 395

ENTITLED,
meaning of, 469, 470, 477
"is now," 589
"shall become," 590

ENTRY,
right of, whether passed by all estate clause, 278

ENUMERATION OF PARTICULARS, 217, 224

EQUITABLE LIMITATIONS,
construction of, 329 *et seq.*

EQUIVOCATIONS, *see* AMBIGUITY, LATENT

ERASURES,
in deeds, effect of, 26, 31, 40

ESCROW, 15 *et seq.*
deed need not be expressly delivered as, 16
question is one of intention, 17
delivery as, evidence to prove, 17, 18, 137, 138
circumstances relied on to prove must not be subsequent to delivery, 18
grantor must have capacity at time of, 18
possession of deed by grantee, evidence of condition performed, 18
when condition performed no further delivery necessary, 18

ESTATE, *see* HABENDUM
vests in grantee on delivery until disclaimer, 19, 20
not divested by destruction of deed creating, 29, 30, 31
word, meaning, 272
immediate, at common law not taken by person not named in premises, 287
not expressly limited in premises, 280
in habendum repugnant to premises, 290

ESTATES BY IMPLICATION, Chap. XX., pp. 373 *et seq.*
cannot arise under deeds, 373
resulting fee-simple to grantor where no consideration and no uses declared, 373
use to grantor where uses declared do not exhaust fee, 374
fee-simple in grantor where there is a limitation to his heirs, 319
none in favour of grantor on conveyance for life or in tail without consideration, 204, 205, 373
stranger, 377
where whole use during grantor's life not disposed of, 374, 375
cross-remainders not implied, 377
except in executory instruments, 381

ESTATE CLAUSE, 271 *et seq.*

ESTATE FOR LIFE,
whether for life of grantor or grantee, 58, 117, 341
passes where no express estate limited, 282
in premises, habendum in fee, 292
in habendum following grant in premises to A. and his heirs, 294, 295
passes by limitation to A. (without more), 341
A. "for ever," 300, 341
"and his assigns for ever," 300
"and his assigns," 341
"his heirs and assigns for life" (on context), 301
"and his executors," 342
"and his issue," 300, 341
"and his seed," 300, 341
"and his successors," 300
"and his heir" (in singular), 300

ESTATE FOR LIFE—*continued.*
passes by limitation to A. "in fee simple" (before 1882), 300
to "issue male," 392
"heir female of the body," 342
implied in grantor, 374, 375
express, not enlarged by gift over on default of issue, 339
by feoffment, habendum to feoffees and their heirs to use of feoffees for ever, 365
under equitable limitations, 330, 331
by trust for wife during coverture, when, 377
under marriage articles, whether impeachable for waste, 615, 616
determinable on event during life, 343
limitation of until alienation or bankruptcy, 344, 345

ESTATE *PUR AUTRE VIE,*
"heirs" explained to mean "special occupants," 282, 292
limitation in premises and habendum repugnant, 81, 296
restricted by habendum, 293
in rent charge, to "A., his executors, &c., habendum to A., his heirs and assigns," 293
words of limitation not necessary for creation of, 352
or for conveyance of, if intention clear, 352
or for limitation of equitable interests in, 356
to A. and his heirs, 307, 353
devolution of determined by conveyance, 353
can be altered, 355, 356
devolves on personal representative under Land Transfer Act, 1897, 353
settlement of, 357
quasi estate tail in, 357, 358
in trustees of settlement, 371
resulting trust of, 375

ESTATES OF INHERITANCE, Chap. XVI., pp. 298 *et seq.*
See ESTATE TAIL, FEE SIMPLE, HEIRS, LIMITATIONS

ESTATE TAIL, 308 *et seq., see* HEIRS OF THE BODY
in habendum, fee simple in premises, 293
by what words limited, 308 *et seq.*
limitation to A. and his "heir" in singular, 309
"in tail," 309
"of his body" supplied by context, 311
by limitation to A. "and his heirs," remainder to collateral heir of A. on failure of heirs of A., 311
importance of designating person from whose body heirs proceed, 313
heirs "of" body, and heirs "on" body, distinguished, 313
limited to husband and wife, 313
by words of reference, 315
special, 314, 315
general, cut down to tail male by context, 314
gift over on alienation void, 316
limited to heirs of body of deceased person, 320
"to right heirs of A. deceased by B. his wife for ever," 321
quasi; in estate *pur autre vie,* 357, 358
by limitation to A. and his heirs with gift over on A.'s death without issue, &c., 338
uses declared on, 363
words giving in cases of realty, applied to personalty, 334
covenant for further assurance by tenant in, 566
assignees of bankrupt mortgagor of, 566
covenant to settle, 601

ESTATES OF TRUSTEES, 367 *et seq., see* TRUSTEES

ESTOPPEL,
by recital, 194 *et seq.*
receipt, 207
recital must be precise, 194
of a material fact, 195
only in action on the deed, 196
mistake of fact may be proved to prevent, 196
how limited as to parties, 196
none if negatived by deed itself, 197
none by recitals in early title-deeds, 197
against married woman, 197
purchaser by admissions of his vendor, 198
right of way, by, 240
estate acquired after contract or conveyance, 568, 569

ESTOVERS,
appendant to house, 250
grant of as appurtenant, 251

EVIDENCE, EXTRINSIC, *see* ANCIENT DOCUMENTS, CIRCUMSTANCES, DIRECT EVIDENCE OF INTENTION
Act of Parliament, as to meaning of words in deeds, 63
as to legal terms in, 67, 68
as to literal meaning of words, 56 *et seq.*
foreign language, 59, 61, 63, 65
technical words, 59, 61, 62, 64
ancient documents, 61
trade terms, 61, 62
cypher, 65
as to meaning of word defined by Act of Parliament, inadmissible, 66
map or plan, 218
of collateral agreement, 129, 130
of custom or usage, *see* USAGE
to explain expressed terms, 57 *et seq.*
add implied terms, 130 *et seq.*
where one party is ignorant of usage, 137
of non-payment of purchase-money, 208
of subsequent admissions or conduct, 138
to clear up patent ambiguity, 97
latent ambiguity or equivocation, 66
to contradict or vary deed, 124
to correct description of parties, 177
to explain erroneous reference to date, 176
to prove true consideration, 128, 201, 202
date, 128, 174
to show that deed is not binding, 137
that parties are not *ad idem*, 65
who are members of firm, 179
paid consideration, 205
verbal or parol, what is, 104, 105
inaccurate use of term, 105

EVIDENCE, INTRINSIC,
to construe deed, 75
to exclude literal meaning, 75
to solve equivocation, 103

EXCEPTION,
election by grantor under, 102
construction of, 115, 119
distinguished from reservation, 246
must be clear, 247
of trees, includes right to enter and show them to purchasers, 248
creating covenant, 486
to absolute covenant construed strictly, 501

EXECUTION,
of deed, *see* DEED
presumption as to order of, where several deeds, 79
of fresh, after alteration, 37

EXECUTOR,
assignment by, of all "his" goods and chattels, 277
conveyance by, whether beneficial interest passes, 277

EXECUTORS,
limitations or trusts of personalty, in favour of executors of living person, or A. for life, and his, or remainder to his executors, 405
limitations to, distinguished from limitations to next of kin, 405, 406
"or administrators," on context meaning next of kin, 406, 407
"or administrators of his own family," 406, 407
"administrators and assigns," 407
or administrators, take for benefit of testator's estate, 407
of lessee, exercising option to purchase fee, 408
realty limited to A. and his executors, 342
take under a limitation to A. "and his heirs," of a term of years, 299

EXECUTORY, *see* COVENANTS TO SETTLE, MARRIAGE ARTICLES
contract, followed by deed, 125
trust to convey to heirs of grantor, 320
of personalty "for heirs of body," 335
instruments, rule in *Shelley's Case* does not apply to, 327
limitations, construction, 328
cross remainders implied, 381, 616
when void for remoteness, 385
tenancy in common, 395

EXECUTORY TRUSTS, *see* COVENANTS TO SETTLE, MARRIAGE ARTICLES
defined, 609, 610
involuntary deeds or wills, 610, 611
technical language may be disregarded, 612

EXPRESS PROVISION,
excludes implication, 116, 132, 500

EXPRESSED INTENTIONS,
to be alone regarded, 43, 45, 46, 58
effectuated through form of deed inept, 47 *et seq.*, 332

"*EXPRESSUM FACIT CESSARE TACITUM*," 116, 132, 500

EXTRINSIC EVIDENCE, *see* EVIDENCE, EXTRINSIC

FALSA DEMONSTRATIO, 213, 214, 227

FARM,
meaning of, 221

FEE, *see* FEE SIMPLE
conditional, 307, 308
determinable, at common law, 307
under Statute of Uses, 307
limitation to A. in, omitting "simple," 89, 301

FEE FARM,
deed construed as gran in, 283

FEE SIMPLE, *see* HEIRS
passes by grant to A. for life, habendum to A. and his heirs, 292
or to A. and his heirs, habendum for life or years, 291, 294, 295, 296
estate in fee in premises, estate tail in habendum, 292, 293
limited by what words, 298, 299
without the word "heirs," 302, 303, 304
in customary assurances, 304
does not pass by grant to A. "for ever," or "A. and his assigns for ever," 300, 365
by limitation to A. "in fee," 301
limitation to A. "in fee simple," 299, 300
to king, 302
to corporation, 302
by words of reference, 303
in releases or partition deeds, 302, 303
fine or recovery, 303
declarations vesting property in new trustees, 303
to A. and his "heirs male," or "female," 305, 306
in Crown grant, 306
followed by gift over on death without issue, 338 *et seq.*, *see* DEATH WITHOUT ISSUE
not cut down to estate tail by gift over in default of "such" issue, or without "leaving" issue, 339
restriction on alienation void, 316
unless to specified persons or in mortmain, 317
or while in remainder, 317

FELONY,
deed to compound, 137, 138

FENCE, 238

FEOFFMENT,
construed as covenant to stand seised, 47
as release, 49
deed construed as, 51
operating as execution of power, 52
charter of, reserving rent, 133
charter of, distinguished from a deed, 8

FINE,
deed to lead uses of, 79
uses of, declared by bargain and sale, or feoffment, 51
fee created by, without the word "heirs," 303

FIRM,
evidence to show how constituted when party to deed, 179

FISHING,
grant of exclusive right of, is a profit à prendre, 241

FOOTPATH,
whether included in parcels, 236

FOREIGN LANGUAGE,
evidence of meaning, 59, 61, 63, 65

FORFEITURE,
conveyance not construed so as to work, 231, 232

FORGERY,
deed executed by A. personating B., 22

FRACTION OF A DAY,
not regarded, 159
unless it is necessary to distinguish, 161

FRANKALMOINE, 302

FRANKMARRIAGE, 289, 292, 302, 309

FRAUD,
evidence to show deed not binding for, 137

FREEHOLD IN FUTURO,
grant of construed as covenant to stand seised, 48
as grant of reversion, 49
lease for lives "from the day of the date" is not grant of, 164
grant of, void, 383, 384
plot of land to be ascertained by election, 102
feoffment habendum after death of feoffor, 281
conveyance habendum after death of grantor, 295

FREEHOLDS,
alone pass by general description, when, 231

"FROM,"
a day, excludes the day, 163
a place, may be inclusive, or exclusive, 172

FURTHER ASSURANCE. pp. 563 *et seq.*, *see* COVENANT FOR FURTHER ASSURANCE

FUTURE ESTATE, *see* FREEHOLD IN FUTURO, TERM

FUTURE PROPERTY,
assignment of, 508, 509, 510
operating as covenant, 508
must be defined, 509
if assignee of, obtains possession he gets legal title, 509, 510

GARDEN,
passes as appurtenant to house, 250

GAVELKIND,
lands, limited to A. and "his eldest heirs," 306
to heir as purchaser, 318
to be settled under marriage articles, 613

GENERAL DESCRIPTION, OR STATEMENT,
joined to specific, 107, 108
in recital, controlled by operative part, 181
in operative part does not extend specific in recital, 185
controlled by recital, 186 *et seq.*
specific description, 212, 213, 215 *et seq.*, 228
another general description, 212
introduced by "and also," &c., limited to things *ejusdem generis*, 227
where only freeholds pass by, 231

GENERAL NAMES,
what are, 210
parcels described by several, 212
with special description added, 212, 213, 214

GENERAL WORDS, Chap. XIV., pp. 249 *et seq.*
exception among, effect of, 231
things appendant or appurtenant pass without, 250

GENERAL WORDS—*continued.*
now implied by Conveyancing Act, 1881, s. 6, 249
restricted to that which grantor could properly grant, 255
when rights of way pass under, 260, 261, 262
"with all ways used and enjoyed," &c., meaning and effect of words, 261, 262
whether allotments pass by, 252
do not revive extinguished rights of common, 254
or quasi-easements long disused, 255

GIFT OVER,
on death without issue, or failure of issue, 338, *see* DEATH WITHOUT ISSUE
of portions, *see* PORTIONS

"GIVE,"
word, covenants created by, 498

"GOODS AND CHATTELS,"
assignment by executor of all "his," 277

GRAMMAR,
false, disregarded, 82

GRANDCHILDREN,
a secondary meaning of children, 416

GRANT,
deed of, construed as covenant to stand seised, 48
at common law, instances of deeds construed as, 49
taken most strongly against grantor, 117 *et seq.*
by the Crown, *see* KING
by deed, distinguished from parol licence, 251
of part of tenement, 255, *see* EASEMENTS
customary, by copy, 289
word, covenants created by, 498

GRANTEE,
construction in favour of, 117 *et seq.*, 297
objected to, 121
where he is also grantor, 121
election by, 54, 99
ignorant of existence of deed of grant, estate vests in, 14, 15
not named in premises, but only in habendum, 283, 287
named alone in premises, and together with others in habendum, 287
not named in premises, cannot take immediate estate at common law, 287
but can take in remainder, 287
named in premises only, 290
one of several, incapable of taking, 393, 445

GRANTOR,
words construed against, 117 *et seq.*, 297
no implied reservation in favour of, 264
except way of necessity, or reciprocal easement, 264
even when grant is by way of mortgage, 264
cannot derogate from grant, 268, 270
estate of, to be regarded in construing grant, 296
limitations to heirs, or heirs of body of, 319, 323
resulting use for life to, 374
election by, under exception, 102

GREGORIAN CALENDAR, 151, 152

GUARANTEE,
altered by adding seals, 38
by striking out names, 38

HABENDUM, Chap. XV., 279 *et seq.*
looked at to supply or correct premises, 86, 280, 290
explaining premises and making tenancy in common, 116
repugnant, 81, 290, 291, 294
in lease, construction, 119, 120, *see* LEASE
construed against grantor, 120
general words in, controlled by recital, 186
from and after "the said lease," where lease misrecited, 193, 194
proper office of, to limit estate, 279, 280, 291
not essential, 285
thing granted, or parcels, should not be named in, 280
named only in, do not pass, 284
unless implied in premises, 284, 285
where none, 285
grantee named only in, 283, 285, 287, 289
named together with others in, but alone in premises, 287
not named in, 290
estates, express, limited only in, 280
limited in, and also in premises, 283, 284, 290, 296
repugnant to premises, 290, 296
may extend but not abridge premises, 283, 284, 290, 296
in fee, following life estate, 292
estate tail, 293
in tail, following fee simple estate, 292, 293
for life or years, following limitation in fee simple, 292, 293, 296, 297
explaining "heirs" to mean "heirs of body," 293
to A., "his heirs and assigns," following grant to A., "his executors," &c., 293
controlling joint tenancy, 116, 281, 364
rejected as void, 291, 292, 294, 295
void, construction of, to qualify premises, 294
enlarging premises, 291, 293
to B. alone, following grant to A. & B., 294
limiting freehold in futuro, rejected, 294
term assigned to H., habendum to J. and another for lives, with remainders over, 295
habendum rejected, 295
assigned, habendum after death of grantor, 295
chattel assigned habendum in futuro, 295
in grant of life estate, 293, 296
estates in, different from premises where further act necessary to perfect one of them, 296
for less estate than that limited in premises, 293, 295, 296
to A., "his heirs and assigns for life," 301
and limitation of uses, construction of, 364, 365
to feoffees "and their heirs for ever to the use of the feoffees for ever," 365

HEDGE AND DITCH,
presumption as to ownership, 238

HEIR IN THE SINGULAR,
A., and his, 299, 300
the "heir of his body," 309, 328
A. for life with remainder to his, 328
"heir or heirs," 301
meaning heirs, 300, 329
of deceased person, 317
heir at common law takes under limitation to, as purchaser, 318
"female of the body," 322
heir of the body applied to personalty, 335

HEIRS, *see* FEE SIMPLE, LIMITATIONS, MARRIAGE ARTICLES
limitation to A. and B. "et haeredibus" void for uncertainty, 99, 109, 301
heirs of a particular description as purchasers, 109, 318
A. "and his heirs" or "heirs and assigns," 298, 299, 301

HEIRS—*continued.*
limitation to, "his" omitted, 301
for a term of years, 299
during life of B., 307
with limitation over on death of A. without issue, 311
with remainder to B., who may be heir of A., 311
in marriage articles, 613
A. "or" his heirs, 301
A. and his "heirs lawfully issuing," 305
A. and "his heirs male," 305, 307, 310
in crown grant, 306
in grant of peerage, 306
in grant of armorial bearings, 307
A. and the heirs of B., where B. is A.'s paternal ancestor, 305
A. and "*his* heirs of the body of his father," 306
A. and "*the* heirs of the body of his father," 322
the heirs of A. deceased, 317
and B., 318
explained by habendum to mean "heirs of body," 293
to mean "special occupants," 292, 296
construed "heirs of body," 306, 310, 311, 321
grant to A. and his heirs habendum for life or years, 291, 294, 295, 296, 301
word, rejected on context, 301
supplied by context, 315
extended by implying parenthesis to all children, 315
word, not essential, in limitations to king or corporations, 302
in releases or partition deeds, when, 302, 303
gifts in frankmarriage or frankalmoine, 302
creations of nobility by writ, 302
bargain and sale, before the Statute of Uses, 303
when fee limited by reference, 303
in fine or recovery, 303
in declarations vesting property in new trustees, 303
in customary assurances of copyholds, 304
or "heir" of deceased person, limitations to, 317
of grantor, limitation in remainder to, 319, 320, 322, 375, 376
trust to convey to, 320
of living person, immediate limitation to, void, 319
of living person not grantor, in remainder to, 319, 322
word, in limitations in settlements, extended by parenthesis, &c., to all children, 315
when word of limitation; rule in *Shelley's Case*, 323, 324
heirs as purchasers,
limitations to A. for life, remainder to "heir," or "heir of body," 328
remainder to "heir of body and heirs (or heirs of body) of such heir," 328
heir at common law takes, 318
with qualification added, as "male," "female," &c., 318
heir male (or female) of body, need not be heir general, 321
"heirs of body" construed "children," and words of purchase, notwithstanding freehold estate in ancestor, 327, 336
under trusts of freeholds and leaseholds together, 328
word applied to personalty, 332
personalty limited to A. "and his heirs," 299, 322
to "the heirs of A.," 332
to heirs of A. in substitution for A., 332
meaning statutory next of kin, 332

HEIRS OF THE BODY, *see* ESTATE TAIL, LIMITATIONS, MARRIAGE ARTICLES
"A. and the heirs of his body," 308 *et seq.*
the body of B.," 320
"heir" in singular "of his body," 309
"heir or heirs of his body," 310
his heirs of the body of his father," 306

HEIRS OF THE BODY—*continued.*
"A. and the heirs of the body of his father," 322
"A., and B. his wife, and the heirs of the body of A.," 313
of A. which he shall beget on the body of B.," 313
of the body of B. by A. begotten," 313
which A. shall beget on the body of B.," 313
"A. and B. and the heirs of their bodies," 314, 315
"heirs of the body of A." (a deceased person), 320
(a living person) in remainder, 322, 375, 376
"A. for life, remainder to the heirs of the body of A. and B.," 323
"of his body" supplied by context, 310, 311, 312
in marriage settlement extended to all children by parenthesis, 315, 316
"of" distinguished from "on" the body, 313
person from whom they proceed must be designated, 313
"begotten," 314
in limitations of copyholds, 308
where words of limitation rule in *Shelley's Case*, 323, 324
purchase, meaning children, 327, 328
applied to personalty,
"A. and the heirs of his body," or "A. for life with remainder to the heirs of his body," 334
followed by gift over on failure of issue, 335
where "heir" of body in singular, 335
"their executors," etc., added, 335
executory trust for heirs of body, 335
construed as words of purchase, 335
meaning statutory next of kin descending from the ancestor, 336

HEIRLOOMS,
covenant to settle chattels as, by reference to limitations of realty, 620

HENCEFORTH,
means from delivery, not date, of deed, 173

HIGHWAY, *see* ROAD
conveyance of land abutting on, 232 *et seq.*

HOTCHPOT CLAUSE,
whether to be inserted in settlements under articles, 622

HOUSE,
conveyance of passes appurtenances, as gardens, ways, conduit, estovers, &c., 250
when passes land usually occupied with, 252, 253
windows, rights as to, 255, 257, 258, 269, 270
support, easement of, 258, 259
road made for use of, whether right of way on severance, 260, 261
built by purchaser of building plot, 268, 269

HUSBAND AND WIFE, *see* MARRIED WOMAN, SEPARATE USE, JUDICIAL SEPARATION
estates limited to, construction, 314, 315, 395
trust of income of wife's fortune until bankruptcy, 344, 355
effect of Married Women's Property Act, 1882, on gifts to, 395

ILLEGIBLE DOCUMENTS, 65

ILLEGITIMATE CHILD, *see* BASTARD

IMPLICATION, pp. 373 *et seq.*, *see* ESTATES BY IMPLICATION

IMPLIED WORDS OR CLAUSES,
expression of has no effect, 112 *et seq.*
excluded by express provisions, 116, 132
accruer of portions, 467

INACCURACIES
defined, 96
distinguished from equivocations, 97, 108
deed or clause made void by, 108
rejected where rest of description sufficient, 109
where direct evidence of intention admitted to explain, 110
where part of description applicable to A., and other part to B., 110
giving rise to equivocation, 109, 110
patent ambiguity, 110

INCLOSURE AWARD,
ambiguous, evidence of acts of owners, 141
whether, passes half the bed of a river, 235

INCONSISTENT CLAUSES
in deed, whether first prevails, 80, 81, 82

INCUMBRANCES, COVENANT AGAINST,
qualified, not restricting general covenant for quiet enjoyment, 552
extends to incumbrances of which purchaser has notice, 563

INDEFINITE LIMITATION
in premises and express in habendum, 282
gives estate for life only, 341
not enlarged by a direction to pay money, 342
by legal estate in fee given to trustees, 342

INDENTURE, *see* DEED
and deed poll, distinction between, 22, 23
words of, to whom ascribed, 121, 122

INDORSEMENT
on deed, read as part of deed, 27, 128
assumed to have been made before execution, 128
indorsed receipt, 206 *et seq.*

INFANT,
deed not binding on, 137
wife, covenant to settle by, 606
election to confirm when adult, 606

IN LOCO PARENTIS, PERSON,
who is, 430, 431
provisions for younger children made by, 430, 431
in settlement on children by, contingency of surviving parents disregarded if possible, 482
interest allowed on portions charged on land by, though contingent, 462

INSURANCE, *see* POLICY
policy, evidence of custom to add terms to, 133, 134

INTENTION,
word, meanings of, 43
expressed, alone to be regarded, 43 *et seq.*, 46, 58
effectuated, notwithstanding inept form of deed, 47 *et seq.*, 332
to be collected from every part of deed, 45
direct evidence of, *see* DIRECT EVIDENCE OF INTENTION
unexpressed, evidence as to, inadmissible, 59

INTERESSE TERMINI, 272, 384

INTEREST,
word, meaning of, 272
interim, effect in vesting portions, 456, 467, 468, 473

INTERLINEATIONS, *see* ALTERATIONS
in deed, presumption as to time of making, 26

INTRINSIC EVIDENCE, *see* EVIDENCE, INTRINSIC

INVENTORY, *see* SCHEDULE

ISSUE, *see* DEATH WITHOUT ISSUE, MARRIAGE ARTICLES
meaning of, 421
in marriage articles, 616, 618, 619
cut down to children, when, 421, 424, 425, 426
by reference to parent, 423
in marriage articles, 424, 623, 624
in some clauses only, 426
"male," 392, 426, 618, 619
"female," 426
is a word of purchase, 427
limitation of realty to, gives life estate, 427
"A. and his issue," 300, 340, 427, 428
"A., the issue of his body," 300, 309, 427
trust of personalty for "A. and his issue," 428
power to appoint to, in marriage articles, 625

JOINT COVENANTS, 512 *et seq.*, *see* COVENANTS, JOINT AND SEVERAL

JOINT AND NATURAL LIVES, 393

JOINT TENANCY, *see* TENANCY IN COMMON
how created, 391 *et seq.*
estates must be of the same nature, 391
at common law must begin at the same time, 391, 393
for life with several inheritances, 314, 391
"benefit of survivorship," 393
between two persons, one of whom is incapable, 393
corporations, none at common law, 394
under statutes, 394
title acquired under Statute of Limitations, 393
settlement of personalty, 392
between crown and subject, none, 394
husband and wife since 1882, 395
purchase by several persons, 395, 396
under limitation jointly and severally, 393, 397
to class, 444, 445
in tail in remainder, 392
controlled by habendum, 116, 281, 364
in lease with proviso as to successive occupation, 288
of policy moneys under Married Women's Property Act, 1870, s. 10, 392, 393

JOINTURE,
deed, cancelled by husband, 23
power to charge, whether inserted in settlement under articles, 625, 628

JUDICIAL SEPARATION,
determines coverture *quâ* property of wife, 413, 591
effect of, on covenant to settle, 413
on restraint on anticipation, 413

JULIAN CALENDAR, 151

KIN, *see* NEXT OF KIN

KING
grant by, taken most strongly against grantee, 122
to A. and his "heirs male," void, 306
election, none against, 123
limitations to, "and his heirs Kings of England," 302
"and his successors Kings of England," 302
and ordinary person, tenancy in common, 394
takes fee simple without words "heirs" or "successors," 302

LADYDAY
formerly first day of year, 150
in deeds means new Ladyday, 152

LAKE
ownership of soil of, 236

LANDLORD AND TENANT, *see* LEASE
estoppel as between, 197

LAND TAX,
redeemed but not merged, whether passed by "all estate" clause, 278

LATENT AMBIGUITY, 96, *see* AMBIGUITY

LEAP YEAR, 151, 153
covenant to pay on the 29th February then next, 176

LEASE, *see* AGREEMENT, TERM
implied terms added to, on evidence of custom, 72, 133
by parol, evidence of customary meaning of Ladyday, etc., 152, 153
cancellation of, not a surrender, 31
examples of deeds construed as, 51, 52
agreement for, when amounts to lease, 52
covenant for renewal in, not construed by usage, 138
inapplicable provisions rejected by force of context, 84
clauses in, of distress or re-entry, 113
"demise," "let," &c., covenants implied by words, 117, 498, 499
and release, one deed, 78
repugnant clauses, 80, 81
by tenant for life, or in tail, 118
construed in favour of lessee, 119, 120, 121
covenant by lessee, construed against him, 121
proviso in, construction, 121
commencement of, determined by election of lessee, 103
"from henceforth," 173
"from the day of the date," 163, 164
where misrecital, 193, 194
in futuro, interesse termini, 384
expires, when, 165
with exception of so many acres not particularly described, 102, 103
"for seven, fourteen, or twenty-one years," 103, 120
under power to lease in possession, 165
parcels in, road, uninclosed strips, 188, 238
misrecital of, in grant of reversion or reversionary lease, 193
power in, to lessor to take back part, 229, 230
for business purposes, effect on lessor's rights of user of land retained, 270
to A. till a sum of money be paid, 343
covenants in, benefit of, whether joint or several, 518, 521
whether dependent or independent, 528, 533, 534, 537, 539, 540
assignment, whether qualified, 551

LEASEHOLDS,
voluntary conveyance of, 204
when, do not pass under general description, 231, 232
when pass as "personal property," 229, 230, 232

"LEAVE,"
construed "have," 480

LEGACIES,
payable at future time or event, 464

LEGAL ESTATE, *see* TRUSTEES

"LEGAL REPRESENTATIVES,"
trust for, 409

LEGAL TERMS
must bear their technical meaning, 45, 67

"*LEGIS CONSTRUCTIO NON FACIT INJURIAM*," 118

"LET,"
covenants in lease implied by word, 499

LIABILITY UNDER COVENANTS, *see* COVENANTS, JOINT AND SEVERAL.
proviso negativing, 501

LICENCE,
construed as lease, 51
parol, distinguished from grant by deed, 251

LIFE ESTATE, *see* ESTATE FOR LIFE

LIGHT,
easement of, on conveyance of house, 255
limited by intentions implied from circumstances, 269
none implied for extraordinary purposes, 269
not restricted by description of land retained as "building land," 270
limited by grantor's power to grant, 270

LIMITATIONS, *see* ESTATE FOR LIFE, ESTATE TAIL, FEE SIMPLE, HEIRS, HEIRS OF THE BODY, KING, JOINT TENANTS, TENANTS IN COMMON
omitted words in, supplied by context, 86, 310
not supplied, 89
explained by recitals, 191, 192
in premises explained by habendum, 290
repugnant, 290, 292, 294
to "A. and his eldest child," 445
"successively," 445
king, in fee simple, by what words, 302, *see* KING
corporations, 302
"heir" female of body as purchaser, 322
"issue male" of A., 392, 426, 427
"issue female and the heirs male of their bodies," 392, 426
two persons successively for life, remainder to the heirs of their bodies, 314, 315, 392
two persons who cannot intermarry, 314, 391
two or more persons, and the heirs (or heirs of body) of one, 313, 392
and their heirs, 391
where one of them incapable of taking, 393
"during their joint and natural lives," 393
"and the survivor and the heirs of the survivor," 392

LIMITATIONS—*continued.*
to two or more persons, jointly for their lives, remainder jointly to heirs, 392
"jointly and severally," 392
feoffees and their heirs to use of the feoffees for ever, 365
several persons, their heirs and assigns, as tenants in common, to the use of them, their heirs and assigns, 365
equitable, construction of, 329 *et seq.*, 357
in settlements, different construction from wills, 332, 370

LIMITATIONS STATUTE OF,
title acquired under, joint tenancy, 393

LIQUIDATED DAMAGES,
or penalty, whether sum named on breach of covenant is, 505
specific performance of covenants secured by, 503, 504, 505

"LITERAL" MEANING,
of words, 56 *et s q.*
extrinsic evidence admissible to determine, 56
excluded by context, 57, 75

LIVERY OF SEISIN,
no longer necessary, 297

LOCALITY, *see* PARCELS
parcels restricted by, 211, 215
inaccurate description of, rejected, 222, 225, 226

MAEREMIUM,
meaning of, 115

MAINTENANCE,
effect of interim, in vesting portions, 455, 456, 459, 460, 467, 468, 473

MANOR,
what passes by grant of, 250

MAP
not evidence to explain parcels when annexed to, but not referred to in, conveyance, 127, 219
held restrictive of parcels, 126, 218, 220
held not restrictive, 127, 219, 224
evidence as to, 218
construction of, whether matter of fact or law, 218, 219
incorporation of, in conveyance, 219
held to control acreage stated in schedule, 220
inaccurate, rejected, 224

MARINE INSURANCE,
policies, evidence of custom to add terms to, 133, 134

MARRIAGE
means valid marriage, 411
settlement in consideration of, means the then intended marriage, 412
never solemnized, 411
invalid, effect on settlement, 410, 411
annulled, effect on settlement, 412
condition in partial restraint of, valid if accompanied by gift over, 412
covenant not to revoke a will, not void as being in restraint of, 511

MARRIAGE ARTICLES, Chap. XXXIV., 609 *et seq.*
executed and executory trusts defined, 609, 610
direction to convey, 611
to settle as counsel shall advise, 611
in executory trusts, when technical language disregarded, 611, 612

MARRIAGE ARTICLES—*continued.*
distinguished from voluntary settlements and wills, 610, 611, 612, 620, 621
nature and purpose point to strict settlement, 611, 612
limitation to A. for life, remainder to heirs, heirs of body, or issue, construed so as to give A. life estate only, 613
even where no express life estate to parent, 616
rule applied in favour of daughters, 616
gavelkind or borough-English lands, 613
context may exclude rule, 614, 618
examples where strict settlement decreed, 613, 614
exceptions to rule requiring strict settlement, 614, 615
(1) where one parent alone could not defeat settlement, 614, 615
(2) where articles settle *part* strictly, 615
articles and settlement both before marriage, 628, 629
articles before and settlement after marriage, 629
letter followed by articles, 630
exception as to variance in interest limited to adult, 629
specific performance of, 630
land, form of the settlement,
"wife and child or children of the marriage," 614
miscellaneous, trustees to preserve, 615
life estate, impeachment for waste, 615
without power of anticipation, 615
"heirs of the body," or "issue," 616
"issue" means both sons and daughters, 616
"settle," agreement to, force of word, 617
"issue, their heirs and assigns," 617
"issue of H. by N. in such shares as H. should appoint," 618
form of gift over, 617, 618
"heirs of the body" after "heirs male of the body," 618
"issue, whether son or daughter," tenants in common in fee, 618
"heirs male of body," "issue male," 618
"heirs female of body" means daughters, 619
"first male issue," 619
"issue male," son of daughter, 619
personalty, form of the settlement,
covenant to settle personalty by reference to strict settlement, 620
restraint on anticipation, 621
children take as tenants in common, 621
at 21 or marriage, 621
hotchpot clause, inserted, 622
trusts in default of children, gift to wife, 622
ultimate trusts, 622
husband entitled as wife's administrator, 622
"issue" may mean "children," 623, 624, 625
general power cut down to power to appoint among children, 623, 624, 625
what powers are to be inserted, 625 *et seq.*
no distinction between wills, articles, &c., 625
distinction between powers of management and of charging, 625
maintenance, education, and advancement, 628
new trustees, 628
to vary securities, 627
of sale, exchange, &c., 626
leasing, 627
mining leases, 627
partition, 627
realty becoming subject to same trusts as personalty, 619, 626
to be purchased and held as personalty, 626
power to raise money, 627
to give receipts, 627
to charge portions or jointure, 628
whether certain powers specified, "usual powers," 625, 626
aliens, realty becoming subject to trusts of personalty, 626

MARRIED WOMAN, *see* COVERTURE, MARRIAGE ARTICLES, SEPARATE USE, SETTLEMENT
estoppel against, 197
post-nuptial settlement of land of, was not voluntary, 204
when trustee for, takes legal estate, 368
trusts for, during coverture, extended to life, 377

MARRIED WOMEN'S PROPERTY ACT, 1882,
no effect on construction of marriage settlements, 346, 603
effect of on limitations to husband and wife, 395

"MARTINMAS"
in deed means Martinmas new style, 152

MAXIMS,
Accessorium non ducit sed sequitur suum principale, 250
Carta non est nisi vestimentum donationis, 43
Contemporanea expositio est fortissima in lege, 140
Designatio unius est exclusio alterius, 116
Ex antecedentibus et consequentibus est optima interpretatio, 76
Expressio eorum quae tacite insunt nihil operatur, 112
Expressum facit cessare tacitum, 116, 500
Falsa demonstratio non nocet, 213, 214, 227
Legis constructio non facit injuriam, 118
Mala grammatica non vitiat chartam, 92
Nihil facit error nominis cum de corpore constat, 177
Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram, 212
Optimus interpres rerum usus, 142
Quaelibet concessio fortissime contra donatorem interpretanda est, 118
Qui haeret in litera, haeret in cortice, 76

MEANING,
literal, what is, 56

MEANS,
in covenant for quiet enjoyment, meaning of, 557

MEMORANDUM AND ARTICLES OF ASSOCIATION,
read together, 78

MEMORIAL,
correcting deed by, 25

MERCANTILE CONTRACTS,
evidence to explain expressed terms, 61, 62
to add implied terms, 130, 131, 133 *et seq.*

"MICHAELMAS,"
in deed means Michaelmas new style, 152

MILL,
what passes by grant of, 250

MINES AND MINERALS,
Crown grant of, does not include royal mines, 123
exception of, includes the space they occupy, 247

MISDESCRIPTION, *see* NAME, PARCELS

MISRECITAL, 193, 194
of lease, 193
may influence construction, 194
may work estoppel, 194
not corrected by reference to recited document, 194

MISREPRESENTATION,
as to effect of deed, result of, 4

MISTAKE,
deed cancelled, or altered by, 41
corrected from context, 86
deed not binding, owing to, 137, 138
as to rights under deed, 148
may be proved in equity to prevent estoppel, 196

MONTH,
usually means lunar month, 78, 155 *et seq.*
but context may indicate calendar month, 78, 157
evidence to explain meaning, 72
means calendar month in ecclesiastical documents, 155, 158
mercantile documents, 155, 158
statutes since 1850, 155
Rules of Court, 155
when it ends, 159

MORTGAGE,
deed retained by mortgagor and not communicated, 15
debt, made payable to mortgagee his "heirs or executors," 103
expenses incurred by mortgagee, no stamp in respect of, 113
transfer of, power of sale, 183
tenancy in common between mortgagees, 396
agreement to execute, effect of, in creating specialty debt, 500

MUTUAL COVENANTS, *see* COVENANTS MUTUAL

NAME, *see* PARCELS
of baptism, 177
surname, 177
may be changed, 178
reputed name, party to deed described by, 177, 180
party described by incorrect name but executing in correct name, 179
firm, 179
corporation, 177, 179
of bastard, 180
reputed wife, 180
divorced woman, 178
general, what is, 210
collective, 212
omitted from premises supplied from habendum, 86, 283
operative part supplied from context, 86
from recitals, 190

"NATURAL LOVE AND AFFECTION,"
statement of, as consideration does not exclude proof of other consideration, 203
evidence of, not admissible when deed stated to be for valuable consideration, 203
evidence of absence of, though parties related, 204

NECESSARY EASEMENTS, 256, *see* EASEMENTS

NECESSITY, *see* WAY
way of, 262 *et seq.*

"NEGLECT,"
meaning of in covenant for quiet enjoyment, 557, 558

NEW TRUSTEES,
construction of conveyance to, 190
fee passes to, by vesting declaration without the word "heirs," 303

"NEXT OF KIN," *see* "NEXT OF KIN ACCORDING TO THE STATUTE"
meaning of, 398
with various words added, 400, 402, 403, 404
do not include husband or wife, 401
when ascertained, 402, 403, 404
distinguished from "executors," 405, 406
take as joint tenants, 400
ultimate trust for, persons taking prior interests not excluded, 401, 402
realty limited to, 330, 400
when they take under grant to "heirs," 332
"heirs of the body," 336
"personal representatives," 408, 409
gift to, of A. "as if she had died intestate and unmarried," 414
without having been married, 414, 415

NEXT OF KIN ACCORDING TO THE STATUTE, *see* "NEXT OF KIN,"
meaning of, 401, 402
"of the name of B.," 404, 405
do not include husband or wife, 401, 409
when ascertained, 402, 403, 404
distinguished from "executors," 405, 406
take as tenants in common, 400, 401
ultimate trust for, persons taking prior interests not excluded, 401, 402
"personal representatives" construed as, 408, 409
gift to, of A. "as if she had died intestate and unmarried," 414
without having been married, 414, 415

NOTICE,
constructive, by recital, 199
absence of receipt, 208, 209
to trustees, want of, does not suspend operation of deed, 15

OBLITERATION, *see* ALTERATIONS

OCCUPANCY,
erroneous description of, rejected, 211, 221, 222
words descriptive of, held to restrict parcels, 215, 216

OCCUPATION,
what amounts to, 216

OMITTED, *see* ESTATE TAIL, PARCELS
words supplied on context, 82, 86
in limitations, 311, 314
but not by extrinsic evidence, 124 *et seq.*
name, in operative part, supplied from recitals, 190

OPERATIVE PART, *see* RECITALS
of deed, if clear, not controlled by recital, 181, 585
if ambiguous, controlled by recital, 185
of release, controlled by recitals, 192
name of grantor omitted from, supplied from context, 86

OPTION
to purchase within six months, how construed, 157
to purchase at any time, void, 385
unless contained in statute, 389
in lessee to purchase fee, exercised by his executors or administrators, 408

"OR,"
read "and," 340

"OR OTHERWISE,"
restricted to purposes "*ejusdem generis*," 229, 230

"OTHER THAN"
an eldest son, 441

PARCELS, Chap. XIII. 210 *et seq.*, *see* HABENDUM, PREMISES, ROAD,
cannot be explained or restricted by conditions of sale, 126
contract for sale, 126
map not referred to in conveyance, 127
explained by usage, 145
where restricted by recitals, 188, 189, 190, 192
words of locality, 211, 215
occupancy, 215, 216
enumeration, 217, 228
special description, 217, 218, 219
tenure, 219
map, 126, 218, 220
where not restricted by recitals, 183
words of locality, 220
name of parish, 224, 226
occupancy, 211, 221, 222
enumeration, 224
special description, 220
quantity, 220, 221
boundaries, 221
map, 127, 219, 224
proper name, 220
described by reference to schedule, 126, 188, 217, 220, 225
former deed, 188, 222
general names only, 210, 212
name and special description, 211, 212, 214
inconsistent descriptions, 225, 226, 227
express words exclude implication, 116
"*falsa demonstratio non nocet*," 214, 227
"used, occupied, &c., with," where lands pass as, 120, 253, 254
"and also," 227
leaseholds or copyholds, whether passed by general description, 231, 232
leaseholds passing as personal property, 232
should not be named in habendum, 280, 285
named in habendum only do not pass, 284
unless implied in premises, 284, 285
description in habendum may explain description in premises, 285, 286

PARENT AND HIS CHILDREN,
limitation to, 445

PARENTHESIS,
may be supplied, 82
"heirs" or "heirs of body" construed by, as applying to all children, 315, 316

PARISH,
distinguished from vill, 222, 223
conveyance of all A's. lands in a, 223
of same name as vill, 223
wrongly named in parcels, 224, 226

PAROL AGREEMENT,
subsequent, to waive, annul, or vary deed, 125
contemporaneous, 126
collateral, not inconsistent, 128, 129

PAROL EVIDENCE, *see* EVIDENCE, EXTRINSIC
defined, 104
inaccurate use of the term, 105

PART OF TENEMENT,
grant of, easements passing by, 255
on contemporaneous sales, 271
reserved on, 264
reciprocal, implied on, 264, 268

PARTICIPLES,
clauses introduced by, may amount to covenants, 486, 540
condition precedent, 539
qualification of covenant, 488, 539

PARTICULAR,
joined to general statement, 107, 181, 185
description, 181, 185, 212, 213, 215, 228

PARTIES, 177 *et seq.*
description of, evidence to correct, 177
names of, *see* NAME
described by class name, 179, *see* FIRM
false additions to, do not vitiate deed, 180
bastard, 180
reputed wife, 180
divorced woman, 178
interests belonging to, in land conveyed, but not in character in which they are made parties, 271, 272
cannot be witnesses, 21
taking benefit under, bound by deed that they do not execute, 22
not executing deed may obtain benefits of an estoppel, 198

PARTITION,
grant of rent on, without the word "heirs," 303

PARTNERS, *see* FIRM
conveyance by, passing separate property, 183
property of, tenancy in common, 396
covenants by, 514, 515

PARTY-WALL, 240

PATENT AMBIGUITY, 96 *et seq.*, 110, *see* AMBIGUITY

PAY
gift made by direction to, 447
on event personal, 471

"PAY TO OR PERMIT TO RECEIVE," 369

PAYABLE, *see* PORTIONS

PAYMENT,
recital of, in voluntary settlement, effect of, 199

PEERAGE,
"heirs" not necessary in creation of, by writ, 302
necessary in creation of, by patent, 302
cannot be limited to "heirs male," 306

PENALTY,
annexed to covenant, effect of, 502 *et seq.*
or liquidated damages on breach of covenant, 503 *et seq.*

PENCIL ALTERATIONS, 27

"PER ANNUM"
does not imply "at the rate of," 154

"PERMIT,"
in covenant for quiet enjoyment, meaning of, 558, 559

PERPETUITY, Chap. XXI. 383 *et seq.*, *see* REMOTENESS

"PERSONAL PROPERTY,"
whether leaseholds pass as, 229, 230, 232

PERSONAL REPRESENTATIVES,
taking as special occupants, 354, 355
trust for, 408
shown by context to mean next of kin, 408, 409

PERSONALTY,
"heirs" applied to, 332
trusts of, for "heirs" or "heirs of the body," 332, 334
trust of followed by gift over on death without leaving issue, 340
unlimited trust of income of, carries the capital, 342
joint tenancy in, 392, 393
portions payable out of, vest at birth, 465 *et seq.*
future or non-existent, effect of assignment of, 508, 509
settled by reference to settlement of realty, 620

PLACE, *see* PARCELS, PARISH
named generally, presumed to be vill, 224

PLAN, *see* MAP

POLICIES,
material alterations in, 32
technical words in, 73
proviso avoiding, 109
marine, evidence of custom to add terms to, 133, 134

PORTIONS, Chap. XXVII. 452 *et seq.*, *see* ELDEST SON
(1) *Charged on land*
sums to be raised out of, or charged on, rents and profits, are charged on corpus, 452, 453
and may be raised by sale or mortgage, 453
unless context shows annual rents and profits only meant, 452, 453
capital sums charged on land payable at fixed times carry interest, 454
when portions vest is a question of construction, 455
when no time named for payment, vest in sons at 21, daughters 21 or marriage, 455
though interim interest or maintenance given, 455
rule applied in favour of other portionists, 457
excluded by language of deed, 458
when no time named, charged on rents and profits vest when rents begin to be applicable, 458
when estate is discharged, 459
payable on event personal to portionist, vesting of, 459, 460, 482
no difference whether charge created by deed or will, 459
payment postponed for convenience of estate, 456, 457, 461, 482
by parent or person *in loco parentis*, maintenance allowed, though portions contingent, 463
contingent, only raised if contingency happens, 463
when treated as payable out of money fund, 464
(2) *Charged on personalty*
application of civil law doctrines as to vesting, 464, 465
whether any distinction between wills and setlements, 465
for children, payable at 21, &c., vest at birth, 465, *et seq.* 482
unless context shows otherwise, 470

PORTIONS—*continued.*
(2) *Charged on personalty—continued.*
gift of interest or maintenance, 467, 468, 473
effect of gift over, 469, 470, 471
"before becoming entitled," 469, 470
payment postponed for convenience, 472, 482
trust created only by direction to pay, etc., on personal event, 471, 472, 482
effect of gift of whole interim interest, 473
discretionary power of maintenance, 473
contingent gift of interest, 473
(3) *Divesting of portions, gift over on death before parents,*
period of distribution and time of vesting distinguished, 473, 474
gift over on death before portion "payable," "assignable," &c., referred to time of vesting not of distribution, 474
rule applies to portions whether charged on land or not, 474
difference between wills and settlements, 475
"payable," "assignable," "transferable," &c., 474, 477
where no express reference to 21 or marriage, 478
gift over if no child or all die before parents, 478
substitution of issue of children dying before distribution, 478, 479
primary gift to survivors only, 479, 480
"leave" construed "have," 480
where one survives all take, 480, 481
(4) *Miscellaneous :*
term to raise, "if A. should die without issue," 337
for daughters under marriage articles, effect as to strict settlement, 618
power to raise, whether inserted in settlement under articles, 628
child taking bulk of estate, excluded from, 430 *et seq.*
exceeding whole value of estate, 441
provided by separate deed, 435, 436, 441
eldest daughter taking estate excluded, 436
eldest son not taking estate included, 433, 434
unless excluded by name, 438
younger child taking estate excluded, 435, 436
unless he takes estate *aliunde,* 436, 437
or is provided for by name, 438
or indefeasible vesting directed by settlement, 439
agreed to be paid by father for daughter is settled by her, 377, 622
rate of interest on, 454

POSTHUMOUS CHILD, 417, *see* CHILDREN

POST-NUPTIAL SETTLEMENT,
of wife's land was not voluntary, 204

POWER,
execution of instrument exercising, 5
released by covenant not to exercise it, 50
executed by instrument not referring to it, 53
by feoffment, lease and release, covenant to stand seised, 52, 53
by recitals, 53, 199
revocation under, examples of deeds operating as, 54
whether deed executing is part of instrument creating, 79, 325, 326
to lease in possession, lease from day of date, 165
of sale in mortgage, transfer of, 183
to appoint, or to revoke, or to lease in covenant to stand seised, 205, 206
of appointment, not given by limitation to "assigns," 301
appointment under, rule in *Shelley's Case* applies to, 325, 326
of appointment, does not prevent vesting in default of appointment, 447 *et seq.*
to appoint portions, how construed, 455
to raise portions, whether inserted in settlement under articles, 628
general, in marriage articles, how to be restricted, 623, 624, 625
limitations in instrument exercising, when void for remoteness, 386

PREMISES, *see* HABENDUM, LIMITATIONS
of deed, what are, 200, 279
explained by habendum, 280
estate not to be limited in, 279
express, not limited in, 280, 281
limited in, and in habendum, 290 *et seq.*
grantee not named in, 283
when he can take, 287
named only in, 290
named alone in, but with others in habendum, 287
parcels not named in, do not pass, 284
unless impliedly named in, 284, 285

PREMIUM PUDICITIAE,
deed made as, 137, 138

PRESUMPTION,
that alterations are made before execution, 26
of fresh execution after alteration, 37

PRINTED DEED,
altered in writing, 27

"PROCUREMENT," 557

PROFIT Á PRENDRE,
created by covenant, 49, 241
by what words, 241
grant of, is *primâ facie* non-exclusive, 241
may be exclusive, 241

PROVISO,
amounting to covenant, 485, 487
qualifying covenant, 486
excluding liability under personal covenant, 501

PUNCTUATION,
may be supplied, 315

PUR AUTRE VIE, see ESTATE *PUR AUTRE VIE*

PURCHASE MONEY, *see* CONSIDERATION
evidence to show non-payment or return of, 207, 208
payment of, under agreement, effect of, in equity, 185
by several purchasers in unequal shares creates tenancy in common in equity, 395

PURCHASERS, HEIRS AS, *see* HEIRS

QUALIFIED COVENANTS, *see* COVENANTS QUALIFIED

QUANTITY,
words of, in description of parcels, 220, 221, *see* PARCELS

QUASI ESTATE TAIL,
pur autre vie, 357, 358
distinguished from fee simple conditional, 357
may be barred, 357, 358
remainders limited after, may be barred, 358
with consent of tenant for life, 358
cannot be barred by will, 358

"QUARTER"
is 91 days, 153

QUIET ENJOYMENT,
covenant for, *see* COVENANT FOR QUIET ENJOYMENT

RAILWAY,
conveyance to company for special purposes, 259, 269
right of way over, 244

RECEIPT, 207 *et seq.*
for purchase-money, following recital of agreement for sale, effect of in equity, 185
qualified by recital, 192, 207
how far conclusive as to payment, 207, 208
indorsed, absence of, constructive notice, 208, 209
no longer necessary, 209
of building society, 209

RECITAL, Chap. XI. 181 *et seq.*
not necessary part of deed, 181
where operative part controlled by, 185, *et seq.*
where not, 181, 182
explaining doubtful intention or meaning, 185 *et seq.*
covenant to settle property, 190
indemnity bond, 191
limitations, 191
parcels, 186, 188, 189, 190, 192
power of attorney, 190
private statute, 189
receipt, 192, 207
release, 192
covenants to be independent, 191
covenant for quiet enjoyment, 560
supplying name omitted from operative part, 190
not controlling absolute covenant, 183, 585
operating as covenant, 198, 488 *et seq.*
exercise of power, 53, 199
estoppel, 194 *et seq.*
language of, to which party to be ascribed, 196
of former deed, how far proof of its contents, 199
in earlier title-deed, no estoppel by, 197
constructive notice by, 199
relieving purchaser from ascertaining payment of debts and legacies, 199
of objections to title in deed of confirmation, 193
misrecitals, 193, 194

RECOVERY,
fee created by, without the word "heirs," 303
and deed to lead uses are one transaction, 78

REDEMPTION,
proviso for, omitted, 127

RE-ENTRY,
evidence as to form of power of, in former leases, 58
clause of, in lease, 113

REFERENCE,
estate tail created by words of, 315
fee simple created by words of, 303
to limitations of realty, covenants to settle personalty by, 620

REJECTION,
of repugnant words or clauses, 80 *et seq.*, 214 *et seq.*, 283, 294, 295, 306, 542, *see* REPUGNANT

RELEASE,
altered after execution, 32
construed as covenant to stand seised, 48
grant, 49
execution of a power, 53
examples of deeds construed as, 49, 50
taken most strongly against releasor, 118, 120
operative part, controlled by recitals, 192, 193
limited to matters in contemplation though not recited, 193
of all estate and interest controlled by recitals, 275
of actions by legatee who is also executor, 276
where fee created by, without the word "heirs," 302, 303
covenant not to sue operating as, 510

REMAINDER, *see* HEIRS, LIMITATIONS
limited to person not named in premises, 287, 289
limitations in to heirs of grantor, 319
stranger, 319
body of living person, 322
two living persons, 393
to issue of unborn person, 384
class, 446

REMOTENESS AND PERPETUITY, Chap. XXI. 383 *et seq.*
grant of plot of land to be determined by election, 102
limitations creating future estates of freehold, other than remainders, void at common law, 383, 384
good under the Statute of Uses if not too remote, 384
leasehold interest may be made to commence *in futuro*, 384
no estate of freehold can be limited to exist at intervals, 384
limitation to unborn person for life remainder to his issue, remainder void, 384
executory limitations, when void, 385
rule against perpetuities, 385
nothing barrable is too remote, 385, 387
option to purchase at any time, void, 385
even if contained in a lease, 385
reverter, condition for, within the rule, 385
exception of strip of land terminating at "the nearest road to be made," 386
unborn woman cannot be restrained from anticipating life-estate, 386
power, limitations in instrument executing, 386
effect of C. A. 1882 on limitation over in default of issue, 386
legal remainders, whether rule applies to vesting of, 387, 388
rule not applicable to personal covenants, 389
statutory grants or trusts, 389
conditions in defeasance of terms of years, 389
covenants for renewal in leases, 390
negative covenants running with land, 390
fluctuating body, grant to, void, 390
unless by Crown out of Crown property, 390
or charitable, 390
marriage articles, regard paid to rule in construing, 619

"RENDERING"
rent, amounts to covenant, 486

RENEWAL,
covenant for, construed by usage, 147
not construed by usage, 138
not obnoxious to rule against perpetuities, 390

RENT,
reserved to "assigns," 112
passes by grant of reversion, but not *e contra*, 250
grant of, creating life estate, when, 282
on partition, without the word "heirs," 303
till a certain sum be paid, 343

RENT-CHARGE,
created by way of use, 360, 361
in favour of person not having legal estate, 361
is a charge on inheritance, 453
unless context shows annual rents and profits only charged, 453, 454
may be raised by sale or mortgage of the land, 453
unless secured by a term, 454
power to order sale to raise is discretionary, 454

RENTS AND PROFITS, *see* PORTIONS
charges on, 452 *et seq.*

"REPRESENTATIVES,"
trust for, 408
meaning "statutory next of kin," 408, 409

REPUGNANT, *see* GENERAL DESCRIPTION
clauses, the first prevails, 80
words, rejection of, 82 *et seq.*
premises, to habendum, 290 *et seq.*
words, in limitations, rejected, 306

RESERVATION
of rent to "assigns," 112
distinguished from exception, 246, 247
of right to get coals does not *per se* operate as exception of coals from grant, 247
of right to sink pits includes right to erect machinery, 247
implied, of way of necessity, 264, 265, 266, 267
extent of right, 266, 267
none in favour of grantor,
except of way of necessity, 264
way over formed road, 264
reciprocal easements of drainage and support, 264
whether any, of apparent continuous easements, 265
to vendor who retains land for building, 265, 266

RESTRAINT ON ANTICIPATION,
only attached to property given to separate use, 347, 349
attaches on marriage, 350
attached to life interest, *sans waste*, 350, 616
by what words created, 350, 351
annexed to power only, 351
reversionary interest, 351, 605
cannot be attached to life-interest given to unborn woman, 386
property subject to, not bound by wife's covenant to settle, 583
whether wife can elect to give up, 606
whether inserted in settlement of personalty under articles, 621

RESTRAINT OF TRADE, COVENANTS IN, Chap. XXXII. 579 *et seq.*
specific performance of, 504, 505
originally void, 570
now valid if reasonable, 570, 571
reasonableness is question for the Judge, 571
primâ facie reasonable if limited to particular business in particular area, 571
and even if area unrestricted, 573, 574

RESTRAINT OF TRADE, COVENANTS IN—*continued.*
held unreasonable though limited, examples of, 577
covenant not to trade with covenantee's customers, 574
only applied to similar business, 574
whether applies to future customers, 575
unreasonable covenant valid so far as reasonable if severable, 575
restraint severed, as to area, 575, 576
as to business, 576
as to customers, 576
severance as to time, 576
duration of unlimited covenant, 576
restraint limited as to duration *primâ facie* reasonable, 576
benefit of, assignable, 577
how distance is measured, 577
what amounts to a breach, 577, 578

RESTRICTIVE WORDS
in description of parcels, where rejected, *see* PARCELS

RESULTING TRUST, 376
of estate *pur autre vie*, 375
where life interest determinable on bankruptcy, 376
rents of unconverted realty, 376
where there is a trust of wife's property "during coverture," 377
to wife of property settled by her father, 377

RESULTING USE, *see* USES, ESTATES BY IMPLICATION

RETENTION,
of deed by grantor, 13, 14, 15

REVERSION,
deeds of feoffment, or release, or bargain and sale, construed as grants of, 49
misrecital of lease in grant of, 193
is *ejusdem generis* as estate in possession, 230
grant of, passes rent, 250
remains in grantor on creation of a particular estate at common law, 373
gift over on attempt to alienate, good, 317

REVIVOR,
of easements, 251
of rights of common appurtenant, 253, 254

REVOCATION,
examples of deeds operating as exercise of power of, 54

"RIGHT,"
meaning of, 272
of entry, whether passed by all estate clause, 278

RIGHT OF WAY, *see* WAY

RIVER,
conveyance of land abutting on non-tidal, presumed to pass soil of half the bed, 232 *et seq.*
presumption may be rebutted, 232, 234
not rebutted by abuttals, 233
map, 233, 234
rebutted where fishery leased separately, 235
whether it applies to awards under Inclosure Acts, 235
not applied so as to include islands, 236
to inland navigable lakes, 236
to tidal rivers, 236
applied to copyholds and leaseholds, 237

ROAD,
soil of when included in parcels, 188, 232
conveyance of land abutting on, presumed to pass soil of half the road, 232 *et seq.*
presumption may be rebutted, 232, 234, 235
not rebutted by abuttals, 233
measurements, 233
map, 233
applies to streets in towns, 236
pathway, 237
private road, 237
leaseholds, 237
Crown grant, 237
strips by roadside, 238
rebutted, examples, 234, 235
vested in local authority only to extent necessary for control, 236
modern grant of copyholds does not pass soil of, 239
grant of land abutting on, passes right of way by estoppel, 240
over adjoining tenement where it passes, 260, 261

RULE AGAINST PERPETUITIES, 385 *et seq.*, *see* REMOTENESS

SALES,
agreements for, technical words in, 72
void for uncertainty of subject-matter, 98
contemporaneous, reciprocal easements, 271

SAME TRANSACTION,
deeds relating to, how construed, 78
evidence that deeds relate to, 128

SCHEDULE,
annexed after execution, 32, 40
parcels when restricted by, 188, 217, 218
acreage stated in, controlled by plan, 220
of parcels, rejected, 225
referred to, but not annexed, 225
grant by reference to, 188, 217, 218

SEAL,
must be affixed before delivery, 7
added to document after execution, 38
destruction of, by accident, 41
cancellation of, 42

SEALING,
essential to a deed, 6
but does not *per se* make a document a deed, 2
what amounts to, 6, 7, 8
by corporation not equivalent to delivery, 9

SEA-SHORE,
when passed by grant, 145
grant of land abutting on, gives grantee access at all points, 240

SEISIN,
livery of, no longer necessary, 297

SEPARATE ESTATE,
alienable without express power, 351
whether bound by covenant to settle, 582, 583

SEPARATE USE, 345 *et seq.*
attaches on marriage, 345
by what words created, 346, 347, 348
under Married Women's Property Act, 1882, 346
"property settled to," 346
words, creating, under marriage settlements, 346, 347
other deeds, 347
words not creating, 347, 348
whether it arises immediately, 348
revives on re-marriage, 349
legal estate is left in trustees, 368, 369

SEPARATION,
gift over on, 343, 344

SEPARATION DEED,
effect on, of resumption of cohabitation, 413
covenants in, whether independent, 537, 538

SERIES OF DEEDS
forming one transaction, 78, 203

SERVICE,
technical words in contract for, 72
for a year, what is, 171

"SETTLE," 617, *see* COVENANT TO SETTLE

SETTLEMENT, *see* LIMITATIONS, HUSBAND AND WIFE, MARRIAGE ARTICLES, MARRIED WOMAN
altered after execution, 29
whether construed differently from a will, 332, 370, 424, 459, 465, 475, 610
marriage, omitted words supplied on context, 86, 87, 89, 192
clauses transposed to effect intention, 90
gift over on separation, 343, 344
voluntary, not communicated to *cestui que trust*, 14
effect of recitals in, 183, 184, 188, 189, 190
post-nuptial, evidence to prove ante-nuptial agreement, 203
how far voluntary, 204
limitations in, to A. "his heirs and assigns for life," 301
to "heirs" or "heirs of body," extended to all children, 315
to children, without words of limitation, 330, 331, 340
to separate use, 346, 347, 368, 369
estates of trustees, 369 *et seq.*
equitable limitations in, 329 *et seq.*
estates for life only, 330, 331
of personalty, trust for children, joint tenancy, 392
settlement by father, resulting trust for daughter, 377
trust for wife during coverture, extended to life, 377

SEVERANCE,
of tenement, rights as to easements on, *see* EASEMENTS

"SHALL DIE,"
extended to include "are now dead," 382

"SHARE,"
word, meaning of, in settlement, 381

SHARES,
transfers in blank, 35, 36
technical words in underwriting contract, evidence of meaning, 73

SHELLEY'S CASE, RULE IN, 324 *et seq.*
where life estate of ancestor determinable, 324
arises by resulting use, 325
contingent remainders interposed, 324
applies to copyholds, 325
limitations must be in the same instrument, 325
in exercise of powers, 325, 326
one legal, other equitable, 326
words added to limitation to ancestor, 326
words of distribution or limitation added to limitation to heirs, 326, 327
no difference between deeds and wills as to, 327
executory limitation to heirs, 327
contingent remainder to heirs, 327
"heirs of body," construed as words of purchase, 327, 328
not applied to executory instruments, 327
where word used is "heir" or "heir of the body" in singular, 328

SIGNING,
not necessary to a deed as such, 5
necessary if document required to be under hand and seal, 5

SITUATION, *see* LOCALITY

"SOLEMNISED,"
meaning of, 411

SON, *see* ELDEST SON
means legitimate son, 77
unless that meaning excluded by context, 77
bastard described as, 180

SPECIAL OCCUPANTS, 353
"heirs" explained by habendum to mean, 292, 296
class of, explained by habendum, 293

SPECIFIC DESCRIPTION OR STATEMENT,
controls general, 107, 181, 212
not controlled by recitals, 181
in recital, not enlarged by general, in operative part, 185

SPECIFIC PERFORMANCE,
of covenants, where penalty provided for breach, 503
in restraint of trade, 504, 505
for further assurance, 564, 566, 568
of marriage articles, 630

SPELLING,
wrong, disregarded, 82, 93

"SPINSTER,"
construed "discovert" from circumstances, 415

SPORTING,
contract, evidence of meaning of terms in, 72

STAMP,
new, whether required for altered deed, 37
on mortgage, in respect of expenses, &c., 113

STREETS,
ownership of, 236, *see* ROAD

STRIPS OF LAND,
uninclosed, adjoining road, when included in parcels, 238
and communicating with commons, 239

"SUBJECT TO,"
whether covenant created by words, 487

SUBSTITUTIONARY GIFTS,
distinguished from independent, 333
"A. or his heirs," 301
of personalty to "heirs of A.," 332
to issue of children dying in lifetime of tenant for life affecting construction of gifts to children, 478, 479

"SUCCESSORS,"
in limitations to private person, 300
king, 302
corporations, 302

"SUCH,"
wrongly used, construed by context, 90
in trusts of portions, 480

"SUFFER,"
in covenant for quiet enjoyment, meaning of, 558, 559

SUM OF MONEY,
grant of rent till payment of, 343
land till payment of, 343

SUPPLYING WORDS, 82, 86

SUPPORT,
easement of, 257, 258, 259, 264, 268

SURETYSHIP,
bond, not executed by all parties, 19
alteration of, 39
condition in, limited by recitals, 191

SURNAME, 177
may be changed, 178

SURRENDER,
operating as covenant to stand seised, 48
of copyholds, to take effect *in futuro*, 81
conferring fee-simple without the word "heirs," 304

SURVIVOR,
limitation to A. and B. and the survivor of them and the heirs of the survivor, 392
to tenants in common and the survivor, 397

"SURVIVORS,"
read "others," 381, 382

SURVIVORSHIP,
between portionists and their parents, 379 *et seq.*

TAIL, *see* ESTATE TAIL, HEIRS OF THE BODY, MARRIAGE ARTICLES, TENANT IN TAIL

TECHNICAL WORDS,
how construed, 44
literal meaning, 56
may be disregarded in executory trusts, 612
evidence as to meaning, 57 *et seq.*
legal terms, 45, 67

TENANCY IN COMMON,
by limitation to A. and B., their heirs and assigns, as tenants in common to the use of them, their heirs and assigns, 364
to B., C., and D., and heirs, habendum to said B., C., and D., and heirs and assigns, to use of B., C., and D., and heirs and assigns as tenants in common, 364
to several corporations sole, or to corporation sole, or Crown, together with ordinary person, 394, 395
in equity where purchase by several persons unequally, 395, 396
admissibility of evidence to show, 396
of property employed in trade, 396
between mortgagees, 396
by what words created, 397
followed by express gift to survivor, 397
under implied gift in default of appointment, 449
tenants in common, lease or sale by, benefit of covenants, whether joint or several, 518, 519
under executory instruments, 395
marriage articles, 618, 621

TENANCY BY ENTIRETIES, 395

TENANT FOR LIFE, *see* ESTATE FOR LIFE
lease for life by, whether for life of lessor or lessee, 118

TENANT IN TAIL, *see* ESTATE TAIL, HEIRS OF THE BODY, MARRIAGE ARTICLES
lease by, 117, 118
covenant by, to stand seised, 363
further assurances by, 566

TENURE,
parcels restricted by words of, 219

TERMS, *see* LEASES
merged, whether revived by words "grant bargain and sell," &c., 52
words "grant bargain and sell," &c., operating as assignment, 52
how computed where ambiguous words, 117, 119, 120
to commence from date, or day of date, how computed, 163
includes whole anniversary of day from which granted, 165
future, *interesse termini*, 272, 384
is good, 281
assigned, habendum for life, with remainder over, 295
after death of grantor, 294, 295
limitation to A. "and his heirs" for a term, 299
limited to A., remainder to "heirs of his body," 334, 335

TERMOR,
may take fuel, &c., 114

THEATRICAL AGREEMENT,
technical words in, evidence of meaning of, 72

"THEN,"
in trusts for next of kin, 403, 404

"TILL,"
may be inclusive or exclusive, 169

TIME,
from which deed operates, 9, 173
when delivered as an escrow, 15
computation of, *from* a day, 163 *et seq.*
commencing *on* a day, 166
from an event, 166
for ascertaining next of kin, 402, 403, 404
of particular name, 404, 405
"eldest son," 431, 432, 440
"younger children," 431, 432, 440

TITHES,
whether, pass by "all estate" clause, 278

TITLE,
meaning of, 272
of honour, limited to heirs male, 306, 307

"TO BE,"
creating covenant, 486
qualifying covenant, 488
creating condition precedent, 539

TOWNSHIP,
distinguished from parish, 222, 223

TRADE CUSTOMS,
evidence of, to add implied terms to contract, 130, 131, 133, 134, 135, 136
where one party is ignorant of the custom, 137

TRADE TERMS,
construed according to literal meaning, 57
extrinsic evidence as to meaning of, 61, 69 *et seq.*

TRANSFER IN BLANK, 35, 36

TRANSFER OF MORTGAGE, 183

TRANSPOSITION,
of words or clauses, 82, 89, 90

TREES,
grant of, implies right to cut and carry away, 115
exception of, implies power to enter and show them to purchasers, 248

TRUST,
deed, ancient, construed by usage under it, 146, 147
charitable, construed by usage, 141, 146
estate, whether passed by conveyance, 276, 277
resulting, 376
of estate *pur autre vie*, 375
for wife during coverture, extended to life, 377
joint tenancy of personalty under, 392, 393
for several as tenants in common, how created, 397
immediate, for class, who take under, 445
breach of, when a specialty debt arises on, 488

TRUSTEES,
absence of notice to, does not suspend operation of deed, 15
covenant by, personal liability excluded, 116
implied grant of way of necessity by, 263
conveyances by, operation in respect of beneficial interests, 276, 277
new, declarations vesting property in, 303
settlements and wills, difference between as to estates of trustees, 332, 369, 370
when they take the legal estate, 367, 368, 369
in gift for separate use, 368, 369
"pay to or permit to receive," 369
legal estate of, not enlarged or diminished by nature of trusts, 369
cut down by context, 371
estate *pur autre vie* in, 370
to preserve contingent remainders, 369, 370, 371, 372

TRUSTEES TO PRESERVE,
estates of, 369, 370, 371, 372
limitations to be inserted in settlement under articles, 615

"TWELVEMONTH"
means a calendar year, 156
but "twelve months" means forty-eight weeks, 155

UNBORN PERSON,
limitation to issue of, 384, 385

UNCERTAINTY,
deed or clause void for, 98, 108, 109

UNITY OF OWNERSHIP, 251, 253, 254, *see* EASEMENTS

"UNMARRIED,"
meaning of, 414
death reference to, as to next of kin, 400
and intestacy, 414, 415, 416

UNNECESSARY CLAUSE, 112

UNNECESSARY WORDS,
whether construction can be affected by, 114, 115

"UNTIL"
may be inclusive or exclusive, 169

USAGE,
meaning of, 142
ambiguity in use of word, 141
implying additional terms of contract, 130, 131, 133 *et seq.*
where one party is ignorant of it, 137
evidence of, to interpret ambiguous terms, 144
ancient documents, 142
statutes, 148
charitable trusts, 141, 146
charters, 146
mercantile contracts, 69 *et seq.*, 133 *et seq.*
parcels, 145
words, 62, 63, 69 *et seq.*
where some parties have adverse interests, 147
modern, where admissible, 143
terms implied by, must not contradict express terms, 132 *et seq.*, 142

"USE AND BENEFIT,"
for their own, 407

USE, SEPARATE, 345, *et seq.*, *see* SEPARATE USE

USES, Chap. XIX., 359 *et seq.*, *see* TENANCY IN COMMON
how created, 359, 360
raised by declaration of intention, 359, 360
deeds to, how construed, 362
declaration of, transfers legal seisin, 362
but grantees take legal estate if they have duties to perform, 367
consideration necessary to raise, 205
not raised on general consideration, 201
where intent is to pass estate at common law, 360
against intention, 362
declared on A's seisin in favour of A., 363, 364
B., 362, 363
estate tail, 363
by bargain and sale, equitable estates only, 367
determine with estate of grantee to uses, 362, 363

USES—*continued.*
rent charge created by way of use, 367
resulting, 204, 373, 374, 375, *see* ESTATES BY IMPLICATION
prevented by nominal consideration, 374
to no other person than grantor, 377
upon a use, 366
to use of A. yielding rent to B., 367
covenant to stand seised to, by tenant in tail, 363
of fine declared by bargain and sale, or feoffment, 51

VERBAL EVIDENCE, *see* EVIDENCE, EXTRINSIC

"VEST"
meaning of word, 442

VESTING DECLARATION,
under C. A. 1881 may pass fee without the word "heirs," 303

VESTING OF GIFT TO CLASSES, Chap. XXVI., 442 *et seq.*, *see* PORTIONS
where a member of a class included or excluded by name, 443, 444
gift to individual and class or to composite class, 444
they take *inter se per capita*, 444
immediate gift to class, who take under, 444, 445
limitation in remainder to class, who take under, 446, 447
class opening to let in members, 446, 447
whether members of a class take jointly or in common, 400, 428, 446, 449
where gift only by direction to pay, distribute, &c., among class, 447, 471
under express limitations in default of appointment, 447, 448
where power is to appoint by will only, 449
under implied gift in default of appointment, 449, 450
where power is to appoint by will only, 450
persons take as tenants in common, 449

VESTING OF PORTIONS, Chap. XXVII., 452 *et seq.*, *see* PORTIONS
charged on land, 455, 482
not charged on land, 465 *et seq.*, 482

VOLUNTARY DEED OR SETTLEMENT,
concealed, 14
not parted with, 14, 15
retained by grantor and destroyed, 29
intended to take effect by transfer not upheld as declaration of trust if transfer not completed, 54
recital in, of payment, 199
of wife's land, 204
of leaseholds, 204
executory distinguished from marriage articles, 611, 612
does not point to strict settlement, 611
as to following exact words in, 612

VOLUNTEERS
cannot enforce covenant to settle, 606

WALL,
party, meaning of, 240
ownership of, 240
right to use, passing as appurtenance, 285

WARRANTY,
created by covenant, 485

WASTE LAND,
adjoining highway, ownership of, 238, 239

WATER,
right to flow of, 258
underground, right to drain off, 259

WAY, RIGHT OF,
not a continuous and apparent easement, 259
by estoppel, 240
by express grant,
extent of, depends on nature of way and purpose for which intended, 242
examples, 245
not limited to purposes required at time of grant, 243, 244
grantee cannot use for access to other closes, 244
over railway, extent of, 244
can be granted in gross, 244
over road partly formed, 245
grant to "assigns" extends to licensees, 246
by implied grant,
over formed road used before severance, 260
as to convenience ceasing on severance, 261
actually enjoyed by purchaser at date of conveyance passes by general words, 262
of necessity, 256, 262
grantor's land need not surround the close, 262
arises only on severance by grant or devise, 263
where grantor is a trustee, 263
extent of, 263
does not cease with the necessity, 263
selected by grantor, 263
must remain the same way, 264
by implied reservation,
of necessity, 264, 265
extent of, 266, 267
over formed road, 264, 267
where land retained intended for building scheme, 265, 266

WEIGHTS AND MEASURES,
evidence not admissible to show other than statutory intended, 66

WIFE, *see* MARRIED WOMAN
reputed, 180
construed "present wife," 412

WILL,
construction of words creating separate estate, 348
executory trusts in, 610, 611
different from that of deed as to limitations, 327, 332, 370
pay to A. *or* permit A, to receive, 369
portions, 465, 475
same as deed, for rule in *Shelley's Case*, 337
portions, 459, 464, 465
covenant not to revoke a, not void as being in restraint of marriage, 511

WINDOWS,
right to access of light to, on conveyance of house, 255, 257, 258, 269, 270

"WITHOUT HAVING BEEN MARRIED," 415, 416

WORDS,
to be construed in their literal meaning, 56 *et seq.*
defined by Act of Parliament, 66
to be taken against a person using them, 117
to whom attributed, 121

WORDS, SPECIAL,
construction of,
"acre," 66
"acts," 557
"agreed and declared," 492, 583
"all other the," 228
"and also," 227
"appertaining," 75, 253
"as counsel shall advise," 567, 568, 611
"assign," 52
"assigns," 307
"at any one time," 602
"at least," 169
"averment," 98
"bale," 72
"begotten," 314, 417
"besides," 441
"born," 417
"bushel," 66
"but that," 543
"claiming under," 562
"clear days," 169
"days," 159, 163
"*dedi*," 55, 498
"default," 557
"demise," 117, 498, 499
"disturbance," 560
"eldest son," 429 *et seq.*
"entitled," 469
"estate," 272
"farm," 221
"freight," 73
"give," 498
"henceforth," 173
"in each year," 154
"interest," 272
"joint and natural lives," 393
"jointly and severally," 83
"leave," 480
"legal representatives," 409
"let," 499
"*locavit*," 51
"*maeremium*," 115
"marriage," 410
"means," 557
"mines and minerals," 72
"month," 72, 78, 155
"natural love and affection," 203
"neglect," 557
"next of kin," 398
"not less than," 169
"or," 340
"or otherwise," 229
"other than," 441
"pay to or permit to receive," 369
"payable," 473
"*per annum*," 154
"permit," 558
"personal property," 229
"pound," 66
"quarter," 153
"rendering rent," 486
"representatives," 408, 409
"right," 272
"right heirs males," 306

WORDS, SPECIAL—*continued.*
construction of—continued.
"seised," 67
"settle," 617
"shall die," 382
"share," 381
"solemnized," 411
"son," 77
"squared," 66
"sterling lawful money of Ireland," 81
"subject to," 487
"successors," 300, 302
"such," 90, 480
"suffer," 558
"survivors," 381
"thousand," 72
"then," 403, 404
"till," 169
"title," 272
"to be," 486, 588, 539
"twelvemonth," 156
"underwriter," 73
"unmarried," 400, 414
"until," 169
"upon condition," 485
"usage," 141
"vest," 442
"without having been married," 415, 416
"working a wrong," 117
"year," 72, 153
"yielding," 486
"younger children," 429 *et seq.*

"WORKING A WRONG," 117

WRECK,
grant of, 145
includes right of way to take it, 248

YEAR,
commencement of, 150
usually means calendar year, 153, 154
may mean from feast to feast, 153
year of office, 154

"YIELDING,"
rent, amounts to covenant to pay, 486

YORKSHIRE REGISTRIES ACTS, 498

"YOUNGER CHILDREN,"
when meaning younger by birth, 429, 439, 440
children not succeeding to estate, 430, 43
time when character ascertained, 431, 432, 433
include children by subsequent marriage, 431
provisions for, contained in separate deed, 435, 436, 441
wife's realty settled on, 436
eldest daughter taking estate excluded, 436
eldest son or daughter not taking estate included, 434
succeeding to estate, 435
but not under same settlement, 436, 437
portions provided for, by name, 438, 439
vested by settlement before time of distribution, 439
becoming eldest, where no estate settled, 440

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